Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

GRACIE COOK and LITTLETON COOK
Petitioners,

v.

HUGHES TRAINING, INC., HUGHES ELECTRONICS CORPORATION, and RAYTHEON COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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65 pp

QUESTIONS PRESENTED

I. DOES ALLOWING EXPANDED JUDICIAL REVIEW OF ARBITRATION AWARDS CONTRAVENE THE PUBLIC POLICY GIVING DEFERENCE TO ARBITRATION AWARDS AS REFLECTED IN THE PROVISIONS OF THE FEDERAL ARBITRATION ACT (PARTICULARLY IN EMPLOYMENT DISPUTES)?

II. DID THE DISTRICT COURT FAIL TO APPLY THE CORRECT STANDARD OF REVIEW OF THE ARBITRATION AWARD BECAUSE THE DISTRICT COURT FAILED TO CORRECTLY DETERMINE THAT THE ARBITRATION AGREEMENT WAS AMBIGUOUS IN ITS TERMS APPLYING TO THE STANDARD OF REVIEW OF THE AWARD?

III. IS IT UNCONSCIONABLE TO ALLOW AN EMPLOYER TO FORCE ITS EMPLOYEES TO SIGN AN AGREEMENT TO ARBITRATE EMPLOYMENT CLAIMS UNDER THE FEDERAL ARBITRATION ACT, YET ALSO ALLOWS THE EMPLOYER TO MODIFY THE FEDERAL ARBITRATION ACT PROVISIONS RELATED TO STANDARD OF REVIEW?

IV. ALTERNATIVELY, UNDER THE *DE NOVO* STANDARD OF REVIEW PURPORTEDLY SET FORTH IN PART OF THE ARBITRATION AGREEMENT UNDER CONSIDERATION, WERE THERE SUFFICIENT FACTS TO SUPPORT THE ARBITRATOR'S FINDING OF "EXTREME AND OUTRAGEOUS" CONDUCT ON THE PART OF THE EMPLOYER?

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The opinion of the United States Court of Appeals for the Fifth Circuit in *Hughes Training, Inc, Hughes Electronics Corporation and Raytheon Company v. Gracie Cook and Littleton Cook,* 2001 US App. Lexis 14382 (5th Cir. 6/29/01), is set forth in the Appendix attached hereto (App. 1a).

The Judgment of the United States District Court for the Northern District of Texas in *Hughes Training, Inc. et al. v. Gracie Cook and Littleton Cook*, is unreported and set forth in the Appendix attached hereto (App. 12a).

The Order of the United States District Court for the Northern District of Texas in *Hughes Training, Inc. et al. v. Gracie Cook and Littleton Cook*, is unreported and set forth in the Appendix attached hereto (App. 13a).

The written opinion of the arbitrator in Gracie Cook and Littleton Cook v. Hughes Training, Inc., et al. is set forth in the Appendix attached hereto (App. 26a).

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Fifth Circuit affirming the decision of the District Court for the Northern District of Texas was entered on June 29, 2001. This petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. Section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 10 of the Federal Arbitration Act:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration -
>
> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

STATEMENT OF THE CASE

When Gracie Cook was hired on as a full time employee by Hughes Training, Inc., she was required to sign a "Mutual Agreement to Arbitrate Claims." There is also a separate document relied upon by the employer called an "EPRP Arbitration Procedure" which was not signed by Ms. Cook. The Mutual Agreement to Arbitrate Claims forces the employees to submit all "claims and disputes" to arbitration and specifically states that "[t]he decision of the arbitrator shall be final and binding upon all parties."

In April 1998, Gracie and Littleton Cook filed suit in state court against the employer for discrimination, retaliation and intentional infliction of emotional distress, arising out of her employment by Hughes Training, Inc. (which subsequently merged with Raytheon Company). The employer filed an answer by and through their attorney of record, Donald Buckman, with the law firm of Cantey & Hanger, L.L.P. and moved the state district court to compel arbitration, which the court ordered on March 19,1999. Ms. Cook filed a subsequent suit for discrimination and retaliation which also fell under the arbitration umbrella.

After the employer compelled the Cooks into arbitration, the employer suggested Ms. Beth Krugler as the arbitrator. The Cooks deferred to the employer's suggested arbitrator and the claims for intentional infliction of emotional distress and retaliation were submitted to Ms. Krugler for arbitration. The employer was represented at the arbitration by Mr. Charles Coleman.

After two days of arbitration in which the arbitrator carefully listened to all of the witnesses and examined all of the exhibits, she issued an opinion awarding Gracie Cook $200,000 on the claim for intentional infliction of emotional distress and awarding Littleton Cook $25,000 on his claim for loss of consortium arising out of the intentional infliction of emotional distress. The employer, unhappy with the results of the proceeding that it forced the Cooks into, sought to have the district court reverse the decision of the arbitrator that the employer suggested. The district court vacated the award, finding no "extreme and outrageous" conduct on the part of the employer and the district court's decision is presented to this Court for review.

During her employment with employer, Ms. Cook signed a document entitled "Mutual Agreement to Arbitrate Claims" ("the Agreement"). The Agreement also incorporated by reference another document called "EPRP

Arbitration Procedure" ("EPRP"). The Agreement states that arbitration will be "enforced according to the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and shall be conducted in accordance with the 'EPRP Arbitration Procedure' which is incorporated herein by reference."

The Agreement also states that "[t]he decision of the arbitrator shall be final and binding upon all parties." It goes on to specifically reference the intent of the Agreement, which is that "[t]he parties' mutual promises to arbitrate differences, rather than litigate them before courts or other tribunals, provide adequate consideration for each other."

The EPRP Arbitration Procedure referenced in the Agreement purports to require that "in actions seeking to vacate an award, the standard of review to be applied to the arbitrator's findings of fact and conclusions of law will be the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury."

The Federal Arbitration Act ("FAA") provides that an arbitration award may not be vacated unless: 1) the award was procured by corruption, fraud, or undue means; 2) there was evident partiality or corruption in the arbitrator; 3) where the arbitrator was guilty of misconduct which prejudiced the rights of a party; or 4) where the arbitrator exceeded her powers. 9 U.S.C. § 10(a). The employer has not alleged any conduct falling within any of the categories specifically set forth in the FAA.

Gracie Cook began working for the employer as a temporary employee. In September 1993, she began working for the employer as a full time senior engineering assistant. After she obtained a BBA in Management Information Systems, she transferred to the Database Engineering Department, under the supervision of Mike Braudaway. The primary task of the department was to create, using computer simulation, geocells that accurately reflected the topography of various countries to whom the

employer sold its aircraft. The geocells combined into maps that were then used in flight simulators. Each project was named according to the country to whom the aircraft was sold.

Gracie Cook – A Plaintiff in the underlying arbitration and employee of Hughes Training, Inc. (which subsequently merged into Raytheon Company).

Littleton Cook – A Plaintiff in the underlying arbitration and husband to Gracie Cook. His claims are derivative of Gracie's.

Mike Braudaway – Ms. Cook's supervisor in the Database Engineering Department.

Al Resendes – Mike Braudaway's boss.

Carmen Bernal – A co-worker of Ms. Cook's who testified during the arbitration.

Melanie Dively – The Manager of the employer's Human Resources Department who also testified live at the arbitration.

Before Sept. 1993: Ms. Cook worked for the employer as temporary help.

Sept. 1993: Ms. Cook began working for the employer full time as a senior engineering assistant.

October 1994: Ms. Cook receives merit raise based upon her performance evaluation.

November 1994: Ms. Cook receives commendation in her file for "team spirit and can-do attitude."

May 1995: Ms. Cook receives her BBA in Management Information Systems.

June 28, 1995: Ms. Cook receives a letter of commendation for "outstanding performance."

August 1995: Ms. Cook transfers to the Database Engineering Department as a Database Engineer under the supervision of Mike Braudaway.

Fall 1995: Ms. Cook works on Finland and Swiss projects. There are no notations, evaluations, warnings or records of ANY KIND reflecting criticisms of her work performance. Ms. Cook worked extremely hard, including often working through her lunch hour.

February 1996: There was a "good old boy" environment in the Database Engineering Department typified by the guys getting together to play cards and hang out in the "bull pen," which also happened to be the area where Ms. Cook and Carmen Bernal worked. Ms. Bernal and Ms. Cook perceived that there was favoritism by Mr. Braudaway that excluded them. Ms. Cook had a conversation with Al Resendes some time this month where she reported to Mr. Resendes that she felt that women were treated differently in the department.

February or March 1996: Ms. Cook is called into a meeting with Mr. Braudaway, Ms. Bernal and another supervisor for a discussion and, in that meeting, brings up the issue of discrimination in the Database Engineering Department. Mr. Braudaway's response was to tell Ms.Cook that she was "building cow patties."

Instead of reporting Ms. Cook's assertion of discrimination as he was required to do (or even investigating or considering such assertions), Mr. Braudaway "took it as an offensive" and took it as a personal attack. He never reported to his boss or to Human Resources that Ms. Cook had made assertions of discrimination.

After Ms. Cook's complaint of discrimination, according to Carmen Bernal, Mr. Braudaway had a shift in attitude toward Ms. Cook. The pressure was increased on Ms. Cook. Mr. Braudaway began to treat Ms. Cook

differently than other employees, to treat Ms. Cook with disdain and was short tempered with her.

Prior to Ms. Cook making the comments about discrimination in that meeting, there was never anything written by anyone at any time that criticized Ms. Cook's performance in the Database Engineering Department. (note that Mr. Braudaway subsequently changed his answer but could not verify his change).

April 23, 1996: Mr. Braudaway submitted a memo to Mr. Resendes outlining alleged performance problems of Ms. Cook. At that time, Mr. Braudaway suggested to Mr. Resendes that they begin proceedings to fire Ms. Cook. This is the first indication in any record of any kind that there is a problem with Ms. Cook's surface modeling work. Mr. Braudaway admits that he had determined to fire Ms. Cook.

May 1 or 2, 1996. Mr. Resendes suggests to Mr. Braudaway that the company "document and prepare for [Ms. Cook's] termination."

May 8, 1996: Mr. Braudaway gave Ms. Cook a written warning for alleged performance deficiencies. Ms. Cook again raised the issue of discrimination and Mr. Braudaway again failed to report the allegation or respond in any appropriate manner. In fact, Mr. Braudaway testified that his extremely inappropriate and hostile response was "don't play that race card on me."

Mr. Braudaway then set up a "test bed" for Ms Cook to complete or be fired. The "test bed" was a series of fake geocells for her to complete. Ms. Bernal, Ms. Cook's co-worker, testified that it was apparent that Ms. Cook was being set up to fail and that the employer was trying to fire Ms. Cook. According to Ms. Bernal, Ms. Cook "had been bold enough to address a way of life there at Hughes, and the good old boy network, and please excuse that if that is offensive to anybody, but it's alive and well there, and she

had dared to cross that. After that, it was over. Let's get rid of her one way or another. And that's what happened." Note that Mr. Braudaway testified that he believed Ms. Bernal to be a credible person.

May 14, 1996: Ms. Cook met with Ms. Dively, Manager of Human Resources, and Mr. Braudaway regarding the written warning. In this meeting, Ms. Cook again raised the issue of discrimination which was ignored this time not only by Mr. Braudaway, but also by Ms. Dively. Ms. Dively did not even ask Ms. Cook what type of discrimination she was alleging or why she was alleging it. Ms. Cook had been progressively more stressed and upset about the situation. Ms. Cook had discussed with Ms. Dively that she had a stroke in 1988. During the meeting in Ms. Dively's office, according to Mr. Braudaway, Ms. Cook "basically had an emotional breakdown in Melanie's office." She began to lose her ability to speak and then felt a sharp pain that went up her arm, under her breast and down her other arm. According to Mr. Braudaway, when Ms. Cook left the meeting, she was crying, stuttering and rubbing her arm. She had suffered a series of mini-strokes and went out on a medical leave shortly thereafter.

Ms. Cook went out on medical leave receiving physical therapy and speech therapy to recover from her series of strokes, with resultant speech difficulties and memory loss.

Mr. Resendes testified that Ms. Dively told him that Ms. Cook had to go on a leave of absence, that Ms. Cook's stuttering was getting worse, that she thought she may have had a stroke that caused the stuttering and the stammering, and that she was unable to work.

There was at least one conversation between Al Resendes, Mike Braudaway, Cindy Olivo (also in Human Resources) and Melanie Dively concerning Ms. Cook prior to her return from her medical leave of absence as reflected in

Ms. Dively's notes of 7/31/96. They discussed Ms. Cook being checked out by doctors and her ability to do the job. Obviously, they discussed Ms. Cook's medical condition. They knew she had such a serious condition that she had been out on medical leave for over two months. They noted that someone needed to call the company attorney about "what we do with Gracie." They note that "if she is returning for 'rehabilitation', then we can deny this."

August 5, 1996 Ms. Cook returned to work with a release from her doctor that did not contain restrictions, but she told Mr. Braudaway that she had suffered memory loss and that her doctor told her to see what she could do—that she didn't really know what she could do until she tried. (Mr. Braudaway relates this to Ms. Dively). Ms. Cook told Mr. Braudaway that if she was re-trained, she could get back to where she was before the stroke. Mr. Braudaway and Ms. Dively also discussed that Ms. Cook had suffered brain damage. Mr. Braudaway further noted and related to Human Resources that upon her return to work, Ms. Cook was "nervous, stuttering, and not able to talk very well," the very same symptoms Ms. Cook had when she suffered a stroke in front of Mr. Braudaway and Ms. Dively before her medical leave. Mr. Braudaway coldly told Ms. Cook that she was still under the written warning and that they would pick right up where they left off, which had been that if she didn't complete the test cell in eight days, she was fired.

The arbitrator's findings state that the employer knew that there was a high degree of risk of harm to Ms. Cook in forcing her back to work on a test bed and that they (in clear consultation among employers' employees) deliberately proceeded to place her in the harmful situation in conscious disregard and/or indifference to that risk:

> Despite the fact that [employers'] management knew of Ms. Cook's stroke in 1988 and had observed her in apparent

> physical distress and exhibiting stroke like symptoms, precipitating her going out on medical leave for close to three months, on Ms. Cook's first day back at work, a decision was made (after several meetings and telephone conferences apparently, Exhibit 11) to order that she "pick back up" with eight days remaining to complete the test bed designed to establish her competency or incompetency for her work as database engineer....[E]veryone involved knew --or should have known— that they were putting Ms. Cook in a particularly stressful situation in which she was doomed to fail.

The arbitrator found that the employer "knowingly placed Ms. Cook's physical and mental health in jeopardy."

Both Ms. Cook and Mr. Braudaway testified that when Mr. Braudaway told her upon her return from medical leave for her stroke that she had eight days to complete the test bed or she would be fired, she suffered the same symptoms as with her previous stroke. Her treating physician reported that her stress at work caused an increase in her hypertension, which caused her another stroke.

As stated, the arbitrator made a finding of intentional infliction of emotional distress. The employer appealed the finding to the district court. The district court, asserting diversity jurisdiction pursuant to 28 U.S.C. § 1332 (a), vacated the arbitration award. The Cooks appealed to the Fifth Circuit, which affirmed the district court, finding that the arbitration agreement was not ambiguous, that it was not unconscionable and that the employer's conduct was not "extreme and outrageous."

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS ENTERED A DECISION IN CONFLICT WITH THE UNITED STATES COURTS OF APPEAL FOR THE SEVENTH CIRCUIT AND TENTH CIRCUIT ON WHETHER PARTIES TO AN ARBITRATION AGREEMENT MAY CONTRACT FOR EXPANDED JUDICIAL REVIEW OF AN AWARD.

The Mutual Agreement to Arbitrate signed by Ms. Cook states that arbitration will be "enforced according to the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and shall be conducted in accordance with the 'EPRP Arbitration Procedure' which is incorporated herein by reference." The EPRP Arbitration Procedure stated that "[i]n actions seeking to vacate [an] award, the standard of review to be applied to the arbitrator's findings of fact and conclusions of law will be the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury." This language substantially modifies the extremely narrow standard of review set forth in the FAA. The district court and court of appeals both applied the EPRP standard, holding that the parties may modify the standard of review by agreement.

The decision below in the instant matter follows Fifth Circuit precedent holding that an arbitration agreement may expand judicial review of an award beyond the FAA. *Hughes Training, Inc, Hughes Electronics Corporation and Raytheon Company v. Gracie Cook and Littleton Cook,* 2001 US App. Lexis 14382 (5th Cir. 6/29/01) (*citing Gateway Technologies, Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995)). The Ninth Circuit is in accord with such holding, determining that "[f]ederal courts can expand their review of an arbitration award beyond the FAA's grounds,

when (but only to the extent that) the parties have so agreed." *Lapine Technologies Corp. v. Kyocera Corp.*, 130 F.3d 884, 889 (9th Cir. 1997).

However, there are at least two other circuits which disagree with the Fifth and Ninth Circuits with respect to the parties' abilities to contract for expanded judicial review. In *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991), the Seventh Circuit Court of Appeals held that "[I]f the parties want, they can contract for an appellate arbitration panel to review the arbitrator's award. But they cannot contract for *judicial* review of that award...." The Tenth Circuit Court of Appeals is also in disagreement with the Fifth and Ninth Circuits, and provides a compelling analysis explaining why allowing an expanded judicial review contravenes the FAA's policies and goals:

> We disagree, however, with the Fifth and Ninth Circuits' conclusion that the Supreme Court precedent emphasizing the FAA's primary purpose compels enforcement of contractual modifications of judicial review. Although the Court has emphasized that parties may "specify by contract the rules under which arbitration may be conducted," *Volt Info. Sciences, Inc.*, 489 U.S. at 479, it has never said parties are free to interfere with the judicial process. As both the concurring and dissenting opinions in Lapine acknowledge, parties may determine by contract what issues to arbitrate and what rules will govern arbitration, but no authority clearly allows private parties to determine how federal courts review arbitration awards. 130 F.3d at 891 (Kozinski, J. concurring and Mayer, J., dissenting). To the contrary, through the FAA, Congress has provided

> explicit guidance regarding judicial standards of review of arbitration awards. *Prima Paint Corp.*, 388 U.S. at 405. Moreover, if parties desire broader appellate review, "they can contract for an appellate arbitration panel to review the arbitrator's award." (citation omitted)....Unlike the contract clause at issue in *Volt*, the contract clause in this case threatens to undermine the policies behind the FAA. We would reach an illogical result if we concluded that the FAA's policy of ensuring judicial enforcement of arbitration agreements is well served by allowing for expansive judicial review after the matter is arbitrated. The FAA's limited review ensures judicial respect for the arbitration process and prevents courts from enforcing parties' agreements to arbitrate only to refuse to respect the results of the arbitration. These limited standards manifest a legislative intent to further the federal policy favoring arbitration by preserving the independence of the arbitration process.

Bowen v. AMOCO Pipeline Co., 254 F.3d 925, 934-35 (10th Cir. 2001).

The illogical result discussed in *Bowen, supra,* is directly at issue in this case. The state district court enforced the parties' agreement to arbitrate, compelling the arbitration process, only to have the federal district court refuse to respect the results of the arbitration. This process makes no sense, is in direct conflict with the policies as reflected by the FAA and, indeed, is in direct conflict with the very notion of "arbitration." Allowing for expanded judicial review under these circumstances was wrong and should be reversed by this Court. The Defendant should be ordered to pay the

arbitration award, including costs and interest as allowed by law.

II. THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN REFUSING TO ACKNOWLEDGE THE AMBIGUITY OF THE ADHESION CONTRACT FOR ARBITRATION AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The Mutual Agreement to Arbitrate Claims signed by Ms. Cook states that arbitration will be "enforced according to the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and shall be conducted in accordance with the 'EPRP Arbitration Procedure' which is incorporated herein by reference." [R. 402, emphasis added]. It is a well established principle of contract law in Texas that a contract is to be "construe[d] strictly against the party that drafted it." *SMB Partners, Ltd. V. Osloub,* 4 S.W.3d 368, 371 (Tex. App.—Houston [1st Dist.] 1999); *Temple-Eastex, Inc. v. Addison Bank,* 672 S.W.2d 793, 798 (Tex. 1984); *Universal Sav. Ass'n. v. Killeen Sav. & Loan Ass'n,* 757 S.W.2d 72, 76 (Tex. App—Houston [1st Dist.] 1988, no pet.h.).

The Agreement specifically states that it will be enforced according to the terms of the FAA. Webster's Dictionary defines "enforce" to mean "constrain, compel, carry out effectively <enforce laws>." Merriam-Webster Dictionary (visited January 4, 2001) http://www.m-w.com/cgi-bin/dictionary. The FAA contains a specific provision governing the necessary grounds to vacate an arbitration award. 9 U.S.C. § 10. Thus, since the Agreement is to be carried out specifically pursuant to the terms of the FAA, the FAA's provisions concerning vacating the award govern the dispute in this case. Under the very terms set

forth in the Agreement, the Applicants are precluded from urging their Application to Vacate Arbitration Award.

Additionally, the Agreement specifically states that "[t]he decision of the arbitrator shall be final and binding upon all parties." It goes on to specifically reference the intent of the Agreement, which is that "[t]he parties' mutual promises to arbitrate differences, rather than litigate them before courts or other tribunals, provide adequate consideration for each other."

It is also a well established principle of contract law in Texas that if the language of a contract is ambiguous, it is to be construed against the drafter of the contract. *Exxon Corp. v. St. Paul Fire and Marine Ins. Co.*, 129 F.3d 781 (5th Cir. 1997); *Gonzalez v. Mission American Ins. Co.*, 795 S.W.2d 734, 737 (Tex. 1990). Thus, if the Court determines that the language of the Mutual Agreement to Arbitrate Claims is not straightforward in stating that the Agreement is "final" or that it is to be "enforced" in accordance with the FAA, or if there is an apparent conflict between that language and the language of the EPRP, then the Agreement is ambiguous and should be construed against the Applicants. Under these circumstances, the Agreement is either "final" or it is "enforced" in accordance with the FAA and the FAA standard of review governs.

III. THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN REFUSING TO ACKNOWLEDGE THE EXTREME AND OUTRAGEOUS CHARACTER OF THE EMPLOYER'S ACTIONS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The arbitrator's findings of fact and determination of questions of law are precisely set forth in an 18 page opinion that clearly supports the award. The district court's finding

that there was no "extreme and outrageous" conduct is clearly erroneous.

The arbitrator in this case specifically set forth the legal elements of a claim for intentional infliction of emotional distress, stated her specific findings of fact with regard to each element and clearly supported her findings with the record.

A claim involving employment termination can constitute intentional infliction of emotional distress, depending upon the circumstances. *Havens v. Tomball Community Hospital,* 793 S.W.2d 690 (Tex. App.—Houston [1st Dist.] 1990, writ denied); *Higgenbotham v. Allwaste, Inc.,* 889 S.W.2d 411 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *Qualicare of East Tex., Inc. v. Runnels,* 863 S.W.2d 220 (Tex. App.—Eastland 1993, writ denied).

In *Havens,* 793 S.W.2d at 690, the plaintiff was a nurse who alleged that the hospital that she worked for "commenced a course of conduct to harass, humiliate, and degrade her good name..." leading to her wrongful termination. *Id.* at 691. She asserted that the defendant "held her up to ridicule among her peers and among the professional community, causing her shame, professional humiliation, and economic loss." *Id.* The court held that the plaintiff set forth a cause of action for intentional infliction of emotional distress sufficient to defeat a motion for summary judgment. *Id.* at 692.

In *Wilson v. Monarch Paper Co.,* 939 F.2d 1138 (5th Cir. 1991), the Fifth Circuit held that demoting an executive manager to an entry-level warehouse supervisor position with menial and demeaning duties was extreme and outrageous conduct sufficient to support a finding of intentional infliction of emotional distress.

In *GTE Southwest, Inc. v. Bruce,* 998 S.W.2d 605 (Tex. 1999), the Texas Supreme Court addressed in detail the

issue of cumulative acts of harassment. GTE argued, among other things, that 1) it was an ordinary employment dispute and 2) none of the acts, taken alone, were extreme or outrageous. The court noted that "in the employment context, courts and commentators have almost unanimously recognized that liability may arise when one in a position of authority engages in repeated or ongoing harassment of an employee, if the cumulative quality and quantity of the harassment is extreme and outrageous." *Id.* at 615 (emphasis added). It is clear that the facts as stated in this response, taken cumulatively, support a claim for intentional infliction of severe emotional distress.

The Cooks have previously listed numerous pages of facts from the arbitration that demonstrate that the employer set out on a campaign to force Ms. Cook out of employment. Ms. Bernal stated that after Ms. Cook complained of discrimination, Mr. Braudaway treated Ms. Cook differently than he had previously (as well as differently than other employees), treated Ms. Cook with disdain and was short tempered with her. Mr. Braudaway began his campaign to get rid of Ms. Cook only after she complained of discriminatory treatment. While Mr. Bruadaway's treatment of Ms. Cook, retaliatory conduct and campaign to get rid of her all may not constitute intentional infliction, combined with the actions of the employer during and after Ms. Cook's series of strokes, the conduct of the employer is extreme and outrageous. Ms. Cook was unfairly set up to be fired in retaliation for her complaints of discrimination. She had extreme pressure put on her by Mr. Braudaway. She was working long hours and even through her lunch. Mr. Braudaway wrote her up and created a "test bed," telling Ms. Cook that she must complete a substantial amount of work in eight days or she would be fired. Ms. Cook's blood pressure skyrocketed and she had a series of strokes. After her strokes, her main goal was to get back to work. Her doctor told her to try it and see what she could do. The employer

knew that Ms. Cook had suffered a stroke at work, knew that she had suffered brain damage, and knew that her doctor had told her that if she was retrained, she could get back to where she was before she went out sick. Furthermore, as her supervisor was giving her the ultimatum upon her return, she began exhibiting the same symptoms that she had previously exhibited when she had a stroke in the Human Resources office. Knowing all of this information, Mr. Braudaway (in consultation with other management personnel) told her upon her return that she had to finish the test bed (the situation that had brought on her first series of strokes) in eight days or be fired.

The arbitrator's findings state that the employer knew that there was a high degree of risk of harm to Ms. Cook in forcing her back to work on a test bed and that the employer (in clear consultation among the employer's employees) deliberately proceeded to place her in the harmful situation in conscious disregard and/or indifference to that risk. The arbitrator further notes evidence reflecting the indifference of both Mr. Braudaway and the Manager of Human Resources, Ms. Dively, as to Ms. Cook's physical ability to perform the test bed operations. The arbitrator found that the employer "knowingly placed Ms. Cook's physical and mental health in jeopardy." Certainly such conduct, along with the substantial evidence of a course of harassing and retaliatory conduct, is sufficient evidence of extreme and outrageous conduct to support the arbitration award.

Finally, Mr. Cook's derivative claim is not barred. The employer did not contest Mr. Cook's award on any basis other than the fact that it is derivative and if Ms. Cook's award is vacated, Mr. Cook's award should be vacated. Since Ms. Cook's award 1) cannot be vacated under the Agreement and/or FAA or 2) is not clearly erroneous, Mr. Cook's award must stand as well.

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to resolve the conflict in the decisions of the fifth, seventh, ninth and tenth circuits and, ultimately to reverse the order of the United States Court of Appeals for the Fifth Circuit and order the Defendant to pay the arbitration award as well as costs and interest.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-11317
Summary Calendar

HUGHES TRAINING INC.; HUGHES ELECTRONIC CORPORATION; RAYTHEON COMPANY,
Plaintiffs-Appellees,
VERSUS
GRACIE COOK; LITTLETON COOK,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas, Fort Worth Division

Filed June 29, 2001

Before EMILIO M. GARZA, STEWART, and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

Appellants Gracie and Littleton Cook appeal from the district court's final judgment that vacated an arbitration award against Gracie Cook's former employer, Raytheon Company.[1] The Cooks argue that the district court applied an incorrect standard of review to the arbitrator's decision and that, even if the court applied the correct standard of review, the facts support the arbitrator's award of damages for intentional infliction of emotional distress.

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[1] The district court asserted diversity jurisdiction pursuant to 28 U.S.C. § 1332(a). This Court has jurisdiction over an appeal from a final judgment pursuant to 28 U.S.C. § 1291.

I. Facts

Hughes Training hired Gracie Cook as a senior engineering assistant in 1993.[2] When she accepted the job, she signed a "Mutual Agreement to Arbitrate Claims." The agreement stated that all employment disputes would be submitted to final and binding arbitration. The agreement contained the following provision:

> Arbitration under [the] Agreement may be compelled and enforced according to the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and shall be conducted in accordance with the EPRP [(Employee Problem Resolution Procedures)] Arbitration Procedure.

The Employment Problem Resolution Procedures contained thefollowing terms relating to an appeal from an arbitration award:

> Either party may bring an action in any court of competent jurisdiction to compel arbitration under this Agreement, to enforce an arbitration award, and to vacate an arbitration award. However, in actions seeking to vacate an award, the standard of review to be applied to the arbitrator's findings of fact and conclusions of law will be the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury.

By signing the document, Cook acknowledged that she had read both the arbitration agreement and the Employment Problem Resolution Procedures.

After Cook obtained a degree in management information systems, Raytheon transferred her to the Database Engineering Department under the supervision

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[2] Hughes Training merged with Raytheon in 1998.

of Mike Braudaway. Employees in Braudaway's department created "geocells," which are visual databases

that reflect topography in different areas of the world for use in flight simulators. The department worked under stringent budgetary and time demands for which Braudaway was responsible.

According to Braudaway, Cook struggled to comply with the budgetary and time constraints from the beginning. She required two additional weeks of training compared to the other employees in the department. Braudaway teamed Cook with another employee, Carmen Bernal, in an effort to improve the efficiency and quality of her work. Braudaway believed that Cook's work improved somewhat but that she was still "inconsistent" and error-prone.[3] According to Cook, Braudaway accused her of "building cow patties."

After a meeting in May of 1996, Braudaway informed Cook in writing that she would have until May 31, 1996, to improve her data base development skills. At that time, Raytheon would evaluate her work, and, if her skills did not improve, Raytheon would take further corrective action, which could include termination. In response, Cook accused Braudaway of discrimination. Braudaway in turn told her not to "play the race card." Braudaway never reported the discrimination claim to Raytheon's Human Resources Department for an investigation.

Braudaway gave Cook a "test bed" evaluation to complete within a specified period of time without the help of coworkers. Within a few days of receiving the test, Cook met with Braudaway and Melanie Dively, the manager of the Human Resources Department. Cook became very distraught

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[3] During her employment, cook felt that she was not treated the same as other employees. She complained that the department had a "good old boy" network from which she and Bernal were excluded.

and stressed during the meeting. She began to cry, stutter, and rub her arm. Braudaway offered to call Cook's doctor, but she refused.

Cook took medical leave within days of the meeting. She complained to her physician that she had difficulty processing her speech and sustaining her short-term memory. The physician concluded that she suffered from several mini-strokes that were propagated by her stress at work. Raytheon learned that Cook suffered a stroke in 1988 and that, on the date of the meeting, she exhibited stroke-like symptoms.

Upon Cook's insistence, the physician permitted her to return to work on August 5, 1996, ten days before his initial authorization date. The physician provided a written note indicating that she could return'to work without any restrictions. Cook, however, explained to Braudaway that the doctor released her for the limited purpose of assessing the duties she was capable of performing. Braudaway immediately directed her to resume the test cell evaluation she began three months earlier. She had eight days remaining in the evaluation period to complete the project. Upon hearing that she must complete the project satisfactorily or else be fired, she began to cry and stutter as she had done three months earlier. Braudaway told her either to contact Human Resources about a transfer or to call her doctor. Cook voluntarily left Raytheon a few days later.

In April of 1998, Cook filed a complaint in Texas state court alleging intentional infliction of emotional distress in connection with the end of her employment. She also added a Title VII discrimination claim in 1999. Her husband, Littleton Cook, filed a claim for loss of consortium. Raytheon argued that arbitration should be compelled pursuant to the employment agreement, and the trial court agreed.

After conducting a two-day hearing, the arbitrator awarded Gracie Cook $200,000 in damages for intentional

infliction of emotional distress and Littleton Cook $25,000 in damages for loss of consortium. The arbitrator based her opinion primarily on the fact that Raytheon knew Cook previously suffered a stroke and that Cook exhibited symptoms of a stroke at the May 1996 meeting. The arbitrator concluded that Raytheon's reassignment of Cook to the "test bed" evaluation was intentional, caused her "stress," that her stress was "extreme," and that Raytheon's conduct was "extreme and outrageous." The arbitrator determined that Cook'sdiscrimination claim was meritless.

Raytheon filed suit to vacate the arbitration award. Raytheon argued that the parties agreed to the judicial standard of review in the arbitration agreement and that the evidence did not support a finding that Raytheon intentionally inflicted emotional distress. The Cooks argued that the standard of review incorporated in the arbitration agreement was inconsistent with the agreement itself and unconscionable in light of the parties' respective bargaining positions. Alternatively, the Cooks argued that the evidence supported the claim for intentional infliction of emotional distress.

The district court issued an order vacating the arbitration award. The court concluded that the parties lawfully contracted for the more expansive standard of review. The court determined that Raytheon's decision to immediately continue Cook's timesensitive evaluation was not extreme and outrageous conduct. Accordingly, the district court held that Gracie Cook failed to establish her claim for intentional infliction of emotional distress and that Littleton Cook was therefore not entitled to damages for loss of consortium as a matter of law. The Cooks timely filed a notice of appeal.

Standard of Review

A district court's decision refusing to vacate an arbitration award is reviewed under the same standard as any other district court decision. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-49 (1995). We accept findings of fact that are not clearly erroneous and decide questions of law *de novo*. *See General Motors Corp. v. Pamela Equities Corp.*, 146 F.3d 242, 246 (5th Cir. 1998). No different standard applies when we review a district court's judgment vacating an arbitration award. *See Gianelli Money Purchase Plan and Trust v. ADM Investor Serv., Inc.*, 146 F.3d 1309,1310 (11th Cir. 1998).

A district court's review of an arbitration award is usually "extraordinarily narrow." *Antwine v. Prudential Bache Securities, Inc.*, 899 F.2d 410, 413 (5th Cir. 1990). [4]However, "parties are generally free to structure their

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[4] The Federal Arbitration Act allows a district court to vacate an arbitration award

> 1) Where the award was procured by corruption, fraud, or undue means.
> 2) Where there was evident partiality or corruption in the arbitrators, or either of them.
> 3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, . . . or in refusing to hear evidence pertinent to and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
> 4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). In addition to the statutory list, a district court may vacate an arbitration award when the award reflects an arbitrator's "manifest disregard for the law." *Williams v. Cigna Financial Advisors, Inc.*, 197 F.3d 752, 761 (5th Cir. 1999).

arbitration agreements as they see fit." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (qouting *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). An arbitration agreement may therefore expand judicial review of an arbitration award beyond the scope of the Federal Arbitration Act. *See Gateway Technologies, Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995).

Cook contends that the standard of review in the Employment Problem Resolution Procedures was inconsistent with the arbitration agreement itself. She also argues that the contract is ambiguous, and that the ambiguity should be resolved in her favor.

While the agreement stated that arbitration "may be compelled and enforced under the Federal Arbitration Act," it specifically provided that the arbitration process "shall be conducted in accordance with the [Employment Problem Resolution Procedures]." The procedural rules pertained to the entire arbitration process, which included the review of arbitration awards. A contract provision is ambiguous only where the terms are susceptible to differing reasonable interpretations. *See Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 665 (Tex., 1987). Having read the arbitration agreement and the Employment Problem Resolution Procedures, we are convinced that the only reasonable interpretation of the agreement is that the incorporated procedural rules governed the entire arbitration process. The standard of review set out in the Employment Problem Resolution Procedures clearly supplemented the provisions of the Federal Arbitration Act and is not inconsistent with the terms of the arbitration agreement.

Appellants also contend that the employment arbitration agreement is distinguishable from the arbitration agreement in *Gateway, supra,* because the parties in *Gateway* were sophisticated commercial entities whereas Gracie Cook

was an employee negotiating with a large corporation. Contracts in which one party has minimal bargaining power, also referred to as contracts of adhesion, are not automatically void. See *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1154 (5th Cir. 1992) , *cert. denied*, 506 U.S. 1079 (1993); In *re Oakwood Mobile Homes, Inc.* 987 S.W.2d 571, 574 (Tex. 1999). "Instead, the party seeking to avoid the contract generally must show that it is unconscionable." *Id.* "There is nothing per se unconscionable about arbitration agreements." EZ *Pawn Corp. v. Mancias*, 934 S.W.2d 87, 90 (Tex. 1996). "Unconscionability ", has no precise legal definition." *Pony Express Courier Corp. v. Morris*, 921 S.W.2d 817, 821 (Tex. App.--San Antonio 1996, no writ) (quoting *Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 498 (Tex. 1991)). The substantive aspect of unconscionability is concerned. with the fairness of an agreement and must be settled on a case by case basis. *See id.* Although the supplemental standard of review incorporated into the arbitration agreement benefitted Raytheon in this instance, it was equally available to Mrs. Cook had the award been unfavorable to her. It was not unfair for the arbitration agreement to include a standard of review that allowed the district court to assess the arbitrator's legal and factual conclusions. The district court therefore correctly adopted the standard of review incorporated into the parties' arbitration agreement.

Intentional Infliction of Emotional Distress

In Texas, an employee must prove the following elements to establish intentional infliction of emotional distress: (1) the employer acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the employer's actions caused the plaintiff emotional distress; and (4) the emotional distress that the plaintiff suffered was severe. *Wal-Mart Stores, Inc. v. Bertrand*, 37 S.W.3d 1, 13 (Tex. App. 2000). To be extreme and outrageous, "conduct

must be so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* (citing *Brewerton v. Dalrymple, 997* S.W.2d 212, 216 (Tex. 1999)). "Ordinary employment disputes" will not support a claim for intentional infliction of emotional distress. GTE *Southwest, Inc. v. Bruce,* 998 S.W.2d 605, 612 (Tex. 1999). In the employment context, "extreme conduct exists only in the most unusual of circumstances." Id. at 613. "There is no litmus test for outrageousness; whether conduct was outrageous and extreme must be analyzed on a case-by-case basis." *Skidmore v. Precision Printing and Packaging, Inc.,* 188 F.3d 606, 613 (5th Cir. 1999).

The district court concluded that returning Cook to the "test bed" evaluation after her absence from work did not constitute extreme and outrageous conduct. The court relied primarily on the fact that Cook's physician did not expressly list any restrictions on her work duties. The court also surmised that by instructing Cook to complete the "test bed" evaluation within eight days of her return, Raytheon simply resumed her normal work duties.

In *GTE Southwest, Inc. v. Bruce,* a supervisor continuously subjected the plaintiffs to extremely humiliating and abusive conduct for a period of more than two years. *See Bruce,* 998 S.W.2d at 613-14. The conduct involved profanity, urging employees to quit, approaching employees in a physically hostile manner, and other harassing behavior. *See id.* The Texas Supreme Court concluded that the repeated offensive conduct, evaluated as a whole, "went beyond the boundaries of tolerable workplace conduct." *Id.* at 617.

In *Wal-Mart Stores, Inc. v. Bertrand,* 37 S.W.3d 1 (Tex. App.-Tyler 2000), the Texas Court of Appeals compared the facts before it with those before the Texas Supreme Court in *Bruce. See Bertrand,* 37 S.W.3d at 13-15

(citing *Bruce, 998* S.W.2d at 61314). The conduct in *Bertrand* was similar, but far less egregious and of much shorter duration. *See Bertrand,* 37 S.W.3d at 14. The court of appeals concluded that the repeated conduct was not outrageous as a matter of law. *See id.* at 14-15.

This case does not involve the same type of repeated abusive behavior. Cook may have felt ostracized by Braudaway, but Braudaway's conduct leading up to her return from medical leave was no more than a normal employment dispute over an employee's work performance. Braudaway's decision to resume the evaluation immediately upon Cook's return raises greater concern. An employer's conduct may be considered extreme and outrageous if the employer knew that the employee was "peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity." *Fields v. Teamsters Local Union No. 988,* 23 S.W.3d 517, 532 (Tex. App.--Houston [1st Dist.] 2000) (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. f) . Braudaway knew that Cook suffered symptoms of a stroke during the May 1996 meeting. Based on his knowledge of Cook's peculiar susceptibility to emotional distress, the arbitrator concluded that Braudaway's conduct was intentional, extreme, and outrageous.

Although his conduct was insensitive to Cook's peculiar physical susceptibility to stress, we agree with the district court that it was not extreme and outrageous.

> [T]o properly manage its business, an employer must be able to supervise, review, criticize, demote, transfer, and discipline employees. Although many of these acts are unpleasant for the employee, an employer must have latitude to exercise these rights in a permissible way, even though emotional distress results.

Bruce, 998 S.W.2d at 612 (citations omitted). Cook returned to work with her physician's note, which did not list work restrictions. Cook claims that she told Braudaway that she was returning to work in order to assess the work she was capable of performing. It is fundamental to a successful business that an employer have employees that are capable of effectively and efficiently performing their jobs. To ensure the quality of an employee's work, an employer must be able to evaluate an employee's performance. See id. Employer's cannot be expected to cater to the peculiar sensitivities of an employee who cannot physically work in a stressful environment. While Braudaway's conduct was insensitive to Mrs. Cook's condition, his instructions that she resume the evaluation were not extreme and outrageous. The district court's judgment vacating the arbitration award is therefore affirmed.

AFFIRMED

IN THE UNITED STATES
DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

HUGHES TRAINING,	§	
INC., ET AL.	§	
VS.	§	4:00-MC001
GRACIE COOK AND	§	
LITTLETON COOK	§	

Filed October 23, 2000

JUDGMENT

This action came on for decision on an Application to Vacate Arbitration Award before the Court, Honorable Eldon B. Mahon, U.S. District Judge, presiding, and the issues having been duly considered and an opinion having been rendered, it is ORDERED and ADJUDGED that Applicants' Application Lo Vacate Arbitration Award is GRANTED.

The Arbitration Award is hereby VACATED and Judgment is RENDERED that Gracie Cook and Littleton Cook take nothing by this action.

Each party shall bear its own costs in this matter.

Signed this 20th day of October, 2000.

S/Eldon B. Mahon
ELDON B. MAHON
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
OCT 23 2000
US DISTRICT CLERK'S OFFICE

IN THE UNITED STATES
DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

HUGHES TRAINING,	§	
INC., ET AL.	§	
VS.	§	4:00-MC001
GRACIE COOK AND	§	
LITTLETON COOK	§	

Filed October 23, 2000

ORDER

Now before the Court is an Application Application to Vacate Arbitration Award filed by Applicants Hughes Training, Inc., Hughes Electronics Corporation, and Raytheon Company (collectively 'Raytheon"). Respondents Gracie Cook and Littleton Cook (collectively "Respondents") have filed an opposition response to the application, and Raytheon has submitted a reply to the response. The application to vacate the arbitration award is now ripe for disposition. After considering the submissions of the parties, the law and the record in this matter, the Court makes the following determination.

I. FACTUAL SUMMARY[5]

Gracie Cook is a former employee of Raytheon who began working in the database engineering department in 1995 under the supervision of Mike Braudaway. The database engineering department is responsible for creating geocells, which use computer simulations to reflect the topography of the nations to whom Raytheon sells its aircraft. The department operated under strict time and budgetary

[5] Unless specifically cited herein, the factual summary is taken from the findings of fact contained in the Arbitrator's award.

demands. Mr. Braudaway was responsible for the department's completion of projects on time and within or under budget.

Ms. Cook experienced difficulty in performing her job duties. In an apparent attempt to help Ms. Cook improve her performance, Mr. Braudaway paired Ms. Cook with a stronger employee to help train and assist her. Despite her additional training, Ms. Cook's work continued to be viewed as being inconsistent and needing improvement.

On May 2, 1996, Ms. Cook was counseled at a meeting called by Mr. Braudaway and attended by two other Raytheon supervisors. At the meeting, Ms. Cook was told of customer complaints regarding her job performance. Later, on May 8, 1996, Mr. Braudaway sent a memorandum entitled "Written Warning" to Ms. Cook describing her deficient job performance and giving her until May 31, 1996 to improve her job skills. Reporter's Record, Respondents' Arbitration Exhibit 15. The "Written Warning" provided that after May 31, 1996, Ms. Cook was to be reevaluated for further corrective action. Id. Ms. Cook testified at the arbitration that prior to the "Written Warning," she had little or no warning that her job might be in jeopardy. Reporter's Record, vol.. I, pp. 287-288.

Around the time of the "Written Warning," Mr. Braudaway constructed a "test bed" to allow Ms. Cook to demonstrate that she could adequately perform the duties required of her job. Ms. Cook was to complete the test bed on her own and her cubicle mate was instructed not to assist her in its completion.

After receiving the "Written Warning" and beginning to work on the test bed, Cook requested a meeting between herself, Mr. Braudaway, and a representative from Raytheon's Human Resources Department. At the meeting, held on May 14, 1996, Ms. Cook showed signs that she was experiencing "stroke-like" symptoms. She was crying,

stuttering, and rubbing her left arm as if she were in pain. Mr. Braudaway helped Ms. Cook to her car, and Ms. Cook left work to go to her doctor's office. After the meeting, Ms. Cook went on medical leave, receiving short-term disability benefits, and did not return to work until early August 1996. Reporter's Record, vol.. II, p. 32. Ms. Cook later reported to Raytheon that she had a stroke and that was the reason she was on medical leave.[6]

According to Ms. Cook's attorney, while on medical leave, Ms. Cook, "wanted to go back [to work at Raytheon]. She was anxious to go back; she liked working. So she talked [her physician] into releasing her to go back to work on August 5." Reporter's Record, vol. I, p. 13. When Ms. Cook returned to work on August 5, 1996, she provided Raytheon with a medical release from her physician containing no restrictions on her normal job duties. Reporter's Record, Raytheon's Arbitration Exhibit 2. Ms. Cook was instructed to resume her normal job duties and complete the test bed designed to establish her competency as a database engineer. Upon learning that she would have to resume her normal job duties and complete the test bed, Ms. Cook again began to cry and complain that she was having stroke-like symptoms.

Within a few days thereafter, Ms. Cook left the employment of Raytheon. See Reporter's Record, vol. II, pp.32-33.

II. PROCEDURAL BACKGROUND

On or about April 30, 1998, Ms. Cook brought claims against Raytheon in state court for intentional infliction of emotional distress, and later added claims for race discrimination and retaliation, pursuant to the Texas Labor

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[6] The record also indicates that Ms. Cook had suffered a stroke at some point in 1988, seven years before she became employed at Raytheon. Reporter's Record, vol. I. Pp. 15, 122.

Code, Title VII of the Civil Rights Act of 1964, and 42 U.S.C. section 1981, all claims arising from her employment at Raytheon. Mr. Cook also brought a claim in state court for loss of consortium.

Upon beginning her employment with Raytheon, Ms. Cook signed a document entitled "Mutual Agreement to Arbitrate Claims" (hereinafter "Arbitration Agreement"). The Arbitration Agreement provided that "any and all employment disputes not resolved internally through the EPRP [Employer Problem Resolution Procedure] shall be submitted to final and binding arbitration." Reporter's Record, Respondents' Arbitrarion Exhibit 19, p. 1. The agreement further provided that "Arbitration under this Agreement may be completed and enforced according to the Federal Arbitration Act [FAA] and shall be conducted in accordance with 'the EPRP Arbitration procedure,' which is incorporated herein by reference." Id. Raytheon therefore filed a petition to compel arbitration, and the parties eventually agreed to arbitrate Respondents' claims, even though Mr. Cook's claim for loss of consortium was arguably not covered under the Arbitration Agreement. See Execution Information Systems, Inc. v. Davis, 26 F.3d 1314, 1323 (5th Cir. 1994) ("parties may agree to the arbitration of disputes that they were not contractually compelled to submit to arbitration"). The state court then ordered the parties to arbitration on March 19, 2000. See Appendix to Response to Application to Vacate Arbtiration Award at 1.

At the arbitration hearing on February 3-4, 2000, Respondents' counsel apparently abandoned the race discrimination and section 1981 claims, leaving only Ms. Cook's claims for retaliation and intentional infliction of emotional distress, and Mr. Cook's claim for loss of consortium to be decided at the arbitration. On April 3, 2000, the Arbitrator issued an award ("Arbitrator's Award") which found insufficient evidence to establish Ms. Cook's retaliation claim, but awarded Ms. Cook $200,000 for her

intentional infliction of emotional distress claim, and $25,000 to Mr. Cook for his derivative claim for loss of consortium. The Arbitrator based her finding of intentional infliction of emotional distress on Raytheon's assigning Ms. Cook back to her former job duties after she returned to work when Raytheon knew of Ms. Cook's prior health condition. Arbitrator's Award at 12. Raytheon has initiated this proceeding to challenge the Arbitrator's findings of fact and conclusions of law and is requesting this Court to vacate the Arbitrator's Award and render a final judgment in its favor.

III. DISCUSSION

A. Jurisdiction

The Federal Arbitration Act ("FAA") provides that the local federal court located where the arbitrator's award was made may vacate the arbitration award upon the motion of any party. 9 U.S.C. sections 10, 11. However, the FAA does not create an independent basis for federal jurisdiction. Specialty Healthcare v. St. Mary's Parish Hosp., 220 F.3d 650, 653 n. 5 (5th Cir. 2;000). Thus, arbitration provisions can be enforced in federal court only where federal jurisdiction is otherwise independently established, such as by diversity jurisdiction. Southland Corp. v. Keating 465 U.S. 1, 16, 104 S.Ct. 852, 859, n. 9 (1984). In the present case, Raytheon alleges in its Application to Vacate the Arbitration that Hughes Training, Inc. merged into Raytheon in 1998 and Hughes Electronics Corporation merged its defense business into Raytheon in 1997. Application to Vacate Arbitration at 1. Raytheon, the successor-in-interest to both Hughes and the defense portion of Hughes Electronics Corporation, is incorporated in Delaware and has its principal place of business in Massachusetts. See id. Mr. and Ms. Cook are residents of Texas. See id. Since the amount in controversy in this matter exceeds $75,000 and there is a

complete diversity of citizenship, this proceeding is properly before this Court.

B. Standard of Review

Typically a district court's review of an arbitration award is extraordinarily narrow under the FAA. Antwine v. Prudential Bache Securities, Inc., 899 F.2d 410, 413 (5th Cir. 1990). Indeed, the Fifth Circuit has stated that ordinarily, arbitration awards will not be vacated unless: (1) the award was procured by corruption, fraud, or undue means; (2) there is evidence of corruption among the arbitrator; (3) the arbitrators were guilty of misconduct which prejudiced the rights of one of the parties; or (4) the arbitrators exceeded their powers. Gateway Technoloqies, Inc.. v. MCI Telecommunications Corp., 64 F.3d 993, 995 (5th Cir. 1995).[7] However, the parties may agree to a broader judicial review of an arbitration award. See Gateway, 64 F.3d at 996 (agreement that errors of law shall be subject to appeal required court to review de novo legal issues decided by Arbitrator); see also Lapine Technology Corp. v. Kyocera Corp., 130 F.3d 884, 888 (9th Cir. 1998) (courts must honor agreement providing that arbitration award shall be reviewable for errors of fact or law). As recognized by the Fifth Circuit in Gateway,"[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." Gateway, 64 F.3d at 997 n. 3 *(quoting* Volt Info. Sciences v. Board of Trustees of Leland Stanford Junior Univ. 489 U.S. 468, 479, 109 S.Ct. 1248, 1256 (1989)) .

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[7] In the context of this limited review, the Fifth Circuit has also recognized that a district court may vacate awards that are arbitrary or capricious, or in violation of public policy. See e.g., Forsythe Intern., S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1021 (5th Cir. 1990) (recognized that an arbitration award should be vacated if it is fundamentally unfair).

In this case, the Arbitration Agreement provides for an expanded judicial review. Specifically the agreement provides that "in actions seeking to vacate award, the standard of review to be applied to the arbitrator's findings of fact and conclusions of law will be the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury." Reporter's Record, Respondent's Arbitration Exhibit 19 at 3.

Curiously, after voluntarily submitting to the arbitration process and receiving a substantial Arbitration Award, Respondents argue that the expanded standard of review cannot be applied because there is no evidence in the record that Ms. Cook agreed to the arbitration or signed the Arbitration Agreement. However, a review of the record reveals that the Arbitration Agreement was signed by Ms. Cook and was Respondent's Exhibit Number 19 at the arbitration hearing. The agreement was even referenced by Respondent's counsel during her opening statement. Reporter's Record, vol.. I, p. 17. Also, in the March 19, 1999 state court Order that required the parties to attend the arbitration, the state court held "an arbitration agreement exists between plaintiff Gracie Cook and defendants, and [the court] finds that plaintiff Gracie Cook's claims raised in this lawsuit fall within the scope of the arbitration agreement." Appendix to Response to Application to Vacate Arbitration Award at 1. The record before the Court indicates that Respondents signed the Arbitration Agreement, actively and voluntary participated in the arbitration, and there is no evidence to indicate that the Respondents protested the validity of the agreement. See Emerald Texas. Inc. v. Peel, 920 S.W.2d 398, 402 (Tex. App.--Houston [1st dist.] 1996, no writ) (holding that parties, "having signed [the contract], they are presumed to know its contents"); see also Legion Inc. Co. v. Insurance General Agency, Inc., 822 F.2d 541, 543 (5th Cir. 1987) (finding that a district court is generally not required to hold an evidentiary hearing on motions to

vacate arbitrations and that issues may be resolved on the record submitted by the parties). Respondents' argument that the Arbitration Agreement and its terms does not apply to this proceeding is in error. Accord Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S., 9 F.3d 1060, 1064 (2d Cir. 1993) (party estopped from denying its obligation to arbitrate under agreement even when it was not a signatory when it had notice of the agreement and did not object to arbitration clause contained therein); Gvozdenovic v. United Air Lines, Inc., 933 F. 2d 1100, 1105 (2d Cir. 1991), cert. *denied*, 502 U.S. 910, 112 S.Ct. 305 (1991) (where party participated in arbitration and neither refused to arbitrate nor objected to arbitration, agreement to arbitrate could be implied!; Ripmaster v. Toyoda Gosei, Co., Ltd., 824 F.Supp. 116 (ED. Mich 1993) (non-signatory employee held to honor arbitration clause to which its employer was signatory).

Applying the heightened standard of review as provided in the Arbitration Agreement, this Court must apply the standard of review used by an appellate court reviewing a judgment from a bench trial. Under this standard, appellate courts review a trial court's fact-findings, and the factual inferences deduced from them, by a "clearly erroneous" standard of review. Read v. U.S. ex. rel. Dept. of Treasury, 169 F.3d 243, 247 (5th Cir. 1999); Barrett v. U.S., 51 F.3d 475, 479 (5th Cir. 1995); Robicheaux v. Radcliff Material, Inc. 697 F.2d 662, 666 (5th Cir. 1983). As in the present case, where the discreet findings of fact are essentially uncontested by the parties, the review of the lower tribunals factual findings is merely plenary, See Read, 169 F.3d at 247. However, with regard to the legal conclusions reached by the Arbitrator, this Court must apply the de novo standard of review used by appellate courts to examine issues of law. Read, 169 F.3d at 247; Barrett, 51 F.3d at 478; Robicheaux, 607 F.2d at 666.

C. Intentional Infliction of Emotional Distress

Raytheon contends that its conduct could not, as a matter of law, constitute "intentional" infliction of emotional distress. [8] An employee may only recover damages for intentional infliction of emotional distress in an employment context when they can establish the elements of the cause of action. See Worncik Co. v. Cases, 856 S.W.2d 732, 734 (Tex. 1993). To recover damages for "intentional" infliction of emotional distress, a plaintiff must prove that: (1) the defendant acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the actions of the defendant caused the plaintiff emotional distress; and (4) the resulting emotional distress was severe. Burden v. General Dynamics Corp., 60 F.3d 213, 218 (5th Cir. 1995); MacArthur v. University of Tex. Health Ctr., 45 F.3d 890, 898 (5th Cir. 1995); McKethan v. Texas Farm Bureau, 996 F.2d 734, 742 (5th Cir. 1993), *cert. denied,* 510 U.S. 1046, 114 S.Ct. 694 (1994); Twyman v. Twyman, 855 S.W.2d 619-22 (Tex. 1993).

The second element of the tort requires that the "conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Twyman, 855 S.W.2d at 621; see also Johnson v. Merrill Dow Pharmaceuticals, Inc. 965 F.2d 31, 33 .5th Cir. 1992); Cole v. Sisters of Charity of the Incarnate Word, 79 F.Supp.2d 668, 673 (E.D. Tex. 1999). Insensitive or rude behavior, insults, indignities, threats, annoyances, party opressions, or other trivialities do not rise to the level of extreme and outrageous conduct. Wilson v, Monarch Paper Co., 939 F.2d 1138, 1143 (5th Cir. 1992); GTE Southwest, Inc. v. Bruce, 998 S.W.2d 605, 612 (Tex. 1999); Porterfield v. Galen Hospital Corp. 948 S.W.2d 916, 920 (Tex. App.—

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[8] Texas, of course, does not recognize the tort of "negligent" infliction of emotional distress. See Boyles v. Kerr, 855 S.W.2d 593, 97 (Tex. 1993).

San Antonio 1997, writ denied); Restatement (Second) of Torts, § 46, cmt. d. (1965). Extreme and outrageous behavior will only be found when the emotional distress is so severe that no reasonable person could be expected to endure it. Fisher v. State Farm Mut. Auto. Ins. Co., 999 F.Supp. 866, 872 (E.D. Tex. 1998), *aff'd*, 176 F.3d 479 (5th Cir. 1999) ; Benavides V. Moore, 848 S.W.2d 190, 195 (Tex.App.--Corpus Christi 1992, writ deneid). The question of whether the alleged wrongful conduct is extreme and outrageous is a threshold question of law to be addressed by the Court. Richard v. Seariver MaritimeFinancial Holdings, 59 F.Supp.2d 616, 640 (S.D. Tex. 1998), *aff'd*, 189 F.3d 467 (5th Cir. 1999); Navidad v. Alexis, Inc., 875 S.W.2d 695, 699 (Tex. 1995).

Texas law takes a very "strict approach to intentional infliction of emotional distress claims arising in theworkplace." Bruce, 998 S.W.2d at 612. Courts recognize that "to properly manage its business, an employer must be able to supervise, review, criticize, demote, transfer and discipline employees." Bruce, 998 S.W.2d at 612 (*citing* Johnson v. Merrill Dow Pharmaceuticals, Inc., 965 F.2d 31, 34 (5th Cir. 1992)). "Although many of these acts are necessarily unpleasant for the employee, an employer must have latitude to exercise these rights in a permissible way, even though emotional distress results." Bruce, 998 S.W.2d at 612 (citations omitted). Indeed, even conduct which may be illegal may not be the sort of conduct constituting extreme and outrageous conduct in an employment context. Thomas v. Clayton Williams Energy, Inc., 2 S.W.3d 734, 741 (Tex.App.--Houston [14 Dist-] 1999, no pet.); see also Ugalde v. W.A. McKenzie Asphalt Co., 990 F.2d 239, 243 (5th Cir. 1993)(supervisor's reference to plaintiff by racial slurs does not support a claim for intentional infliction of emotional distress). "Even the wrongful transfer, failure to promote, or termination of an employee does not, standing alone, constitute intentional infliction of emotional distress."

City of Midland v. O'Bryant, 18 S.W.3d 209, 216 (Tex. 2000). As a result, Texas courts recognize claims for intentional infliction of emotional distress does not arise from ordinary employment disputes. [9] MacArthur, 45 F.3d at 898; Bruce, 998 S.W.2d at 612. "Only in the most unusual of employment cases does the conduct move out of the realm of an ordinary employment dispute and into the classification of extreme and outrageous conduct."[10] Porterfield, 948 S.W.2d at 920.

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[9] See, e.g., Benningfield v. City of Houston, 157 F.2d 369, 379 (5th Cir. 1998) (requiring an employee to work under a supervisor she disliked does not ordinarily constitute outrageous conduct); Humphreys v. Medical Towers, Ltd., 893 F.Supp. 672, 681 (S.D. Tex. 1995), *aff'd*, 100 F.3d 952 (5th Cir. 1996) (behavior not extreme and outrageous where defendant encouraged employees to act with insubordination toward plaintiff, defendant called plaintiff profane name, defendant told plaintiff she was incompetent and should quit, and defendant treated her with blatant hostility during meetings); Midland v. O'Bryant, 18 S.W.2d 209, 216 (Tex. 2000) (holding that an employer's decision to revise certain job descriptions or to change the nature or compensation for certain positions is not so outrageous and extreme conduct); Wornick Co. v. Casas, 856 S.W.2d 732, 735 (Tex. 1993) (employer's conduct in firing an employee for allegedly possessing incriminating information, then having a security guard escort employee off the premises in the presence of her co-workers is not extreme and outrageous conduct).

[10] See, e.g., Wilson v. Monarch Paper Co., 939 F.2d. 1138, 1145 (5th Cir. 1991) (holding that an employer's systematic and intentional actions to humiliate the plaintiff, a long-time executive with a college education and 30 years experience, and to force him to quit by requiring him to do menial, janitorial duties was extreme and outrageous conduct); Dean v. Ford Motor Credit Co., 885 F.2d. 300, 307 (5th Cir. 1989) (recognizing that supervisor's act of placing checks in the employee's purse to make it appear that she was a thief and to put her in fear of criminal prosecution was extreme and outrageous conduct); Bruce, 998 S.W.2d at 615 (extreme and outrageous behavior found in an employment setting only where there was an ongoing pattern of grossly abusive, physically threatening, and degrading conduct, including the use of vulgarity, screaming, physically charging at arid frightening employees).

In the present case, the Arbitrator found that Raytheon's conduct was extreme and outrageous because Raytheon put Ms. Cook back to work at her normal job duties when it *knew (and had observed) Ms. Cook's response to this added stress a few months earlier and the stroke-like physical symptoms that had resulted*, putting Ms. Cook right back in that same stress-inducing situation was extreme and outrageous. By doing so, Raytheon knowingly placed Ms. Cook's physical and mental health in jeopardy.

Arbitrator's Award at 12 (emphasis in original).

Reviewing the Arbitrator's finding under a *de novo* standard of review, the Court finds that, as a matter of law, Raytheon's returning Ms. Cook to her normal job duties after her absence from work, when she was not restricted by her physician, did not constitute "extreme and outrageous" conduct. All of the actions attributed to Raytheon were within the scope of supervising, reviewing, criticizing, and disciplining Ms. Cook or were a result of those activities. Because the Arbitrator erred in finding extreme and outrageous conduct, without discussing the remaining elements, the Court finds that Raytheon's Application to Vacate the Arbitration Award for intentional infliction of emotional distress should be GRANTED.

D. Loss of Consortium Claim

The Arbitrator found that Mr. Cook was affected by Raytheon intentionally inflicting emotional distress on his wife, and awarded $25,000 to Mr. Cook for his claim of loss of consortium. However, Mr. Cook's claim for loss of consortium is derivative of his wife's intentional infliction of emotional distress claim. Benavides v. County of Wilson, 955 F.2d 968, 975 (5th Cir. 1992). Because this Court finds that the Arbitrator erred in awarding damages to Ms. Cook for the claim of intentional infliction of emotional distress,

Mr. Cook's derivative claim for loss of consortium is barred. Id.; Reed Tool Co. v. Copelin, 610 S.W.2d 7.36, 739 (Tex. 1980). Raytheon's Application to Vacate the Arbitration Award for loss of consortium damages to Mr. Cook is GRANTED.[11]

CONCLUSION

Applying the standard of review found in the Arbitration Agreement, the Court finds that the Arbitrator erred in finding that Raytheon engaged in extreme and outrageous conduct by returning Ms. Cook to her normal work duties after she returned from medical leave. Because Mr. Cook's claim for loss of consortium is derivative of his wife's claim of intentional infliction of emotional distress, an award to Mr. Cook is barred.

The Court therefore ORDERS that Raytheon's Application to Vacate the Arbitration Award is GRANTED. Judgment is RENDERED in favor of Raytheon regarding Respondents' claims for intentional infliction of emotional distress and loss of consortium.

An appropriate judgment shall be entered herewith, vacating the Arbitration Award and RENDERING judgment that Gracie and Littleton Cook take nothing.

Signed this 20th day of October, 2000.

s/Eldon B. Mahon
ELDON B. MAHON
UNITED STATES DISTRICT JUDGE

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[11] Raytheon also challenges the Arbitrator's conditional awarding of attorney's fees to Respondents in the event that the Court upholds the Arbitration Award. However, since the Court finds that the Arbitration Award should be vacated, Raytheon's challenge to the conditional award of attorneys' fees award does not need to be considered.

IN THE ARBITRATION OF
GRACIE COOK
VS.
HUGHES TRAINING, INC.,
HUGHES ELECTRONICS CORPORATION AND
RAYTHEON COMPANY

BACKGROUND FACTS:

Gracie Carroll Cook ("Ms. Cook") was a recent college graduate when in the summer of 1995, she transferred into the database engineering department at the company then known as Hughes Training, Inc. (now Raytheon). Besides perhaps her enthusiasm and excitement for her new position and increased pay, Ms. Cook was by no means the average "new hire". For one thing, Ms. Cook had returned to school later in life (volume 1, page 216), subsequent to surviving a stroke that had left her hospitalized for several days back in 1988 (volume 1, page 112 & 215; Exhibits 13, 14, 15).

Ms. Cook's manager, Mike Braudaway ("Mr. Braudaway") had also taken a rather unique path to attaining his position at Hughes. Neither a computer major nor a business major, Mr. Braudaway had come to work at a predecessor company to Hughes and Raytheon as a "facilities tech", having earned an undergraduate degree in youth ministry and having worked for his father's heating and air conditioning company (volume 1, pages 30-34). After joining the company, Mr. Braudaway steadily worked his way up into a management position.

Although his position with Hughes during Ms. Cook's time in the database engineering department required that he manage employees, by his own testimony, Mr. Braudaway had scant little formal training or education in this arena. In fact, despite his work responsibilities, Mr. Braudaway testified he'd been given only one training class dealing with

employee issues, a class that focused on diversity in the workplace (volume 1, page 34-35). Perhaps as a result of his lack of formal training in this regard, it appears Ms. Braudaway was highly dependent on the Human Resources (HR) Department of Hughes to give him the kind of counsel and advice he needed to insure he made fair and reasonable managerial decisions.

By all accounts, Mr. Braudaway and Ms. Cook were part of a department that was operating under strict time and budgetary demands. The primary task of this department was to create, using computer simulation, geocells that accurately reflected the topography of various countries to whom the defendant company sold its aircraft (volume 1, page 35). In this regard, testimony from Mr. Braudaway indicated that while he had originally requested permission to hire 20 people for his department, he was ultimately given authority to hire only two (volume 1, pages 43-44). This would seem to suggest that there was in fact a lot of work to be done, but not many people to do it.

Additionally, according to the testimony heard in this matter, the time budgeted for the construction of various individual geocells was closely monitored by not only Mr. Braudaway but by his supervisor, Al Resendes, as well (volume 11, page 79-82; 115-118). In fact, Mr. Braudaway testified that one of his primary responsibilities as a manager was bringing in the project at or under budget (volume 1, page 38, 55). Mr. Resendes, as a matter of fact, said that going over budget would end up getting him "crucified" (volume 11, page 81-82). (Further, in later testimony, Mr. Resendes said that if in fact Ms. Cook's doctor's release would have indicated that she was not fully released to return to work, but instead, released only to go back and see what she was capable of doing, his response would have been: "We have a budget to perform these tasks ...We have to be able to do that. We can't really afford you." Volume II, page 110).

According to Mr. Braudaway's testimony, Ms. Cook showed early signs of having difficulty in performing her job (volume 1, pages 57-58). According to his testimony (Ms. Cook does not recall; Carmen Bernal testified contrary to Mr. Braudaway) Ms. Cook required twice the normal two week training time new hires typically received in this department (volume I, page 135-136). (In fact, Mr. Braudaway testified that he had had to charge half of this additional training to the project they were working on at the time, which meant the project would cost that much more to complete, an apparent negative factor with upper management keen on keeping an eye on the bottom line.) Other witnesses testifying for the defense gave conflicting estimates regarding the amounts of time they and others were "typically" trained, but suffice it to say, it was Mr. Braudaway's sworn testimony that Gracie Cook required far more training than the average employee and that he saw to it that she received it.

Based on the overall tenor of the greater weight of the testimony proffered, Gracie Cook did seem to encounter performance related problems on her new job. What is less clear is what kind of feedback Ms. Cook was given and when she was given it (volume I, pages 60-72). While it sounds as though various "leads" (Ms. Cook's technical managers, so to speak, on the various projects, she was assigned to) may have made some negative statements to Mr. Braudaway about Ms. Cook's performance, prior to April of 1996, the testimony is sketchy at best as to what actions, if any, Hughes took to bring these problems to her attention or to help her better perform on the job. (We do know that Ms. Bernal, who was seen as a stronger employee, was paired with Ms. Cook at one point in an apparent attempt to help Ms. Cook do a better job; volume I, page 58. There was also testimony that special training for the group overall was arranged for April 15, 1996, which Mr. Braudaway testified was in fact designed to help Ms. Cook get up to speed. Beyond that, testimony regarding both feedback and genuine remedial efforts to help Ms. Cook's performance is conflicting; volume I, pages *80ff.*)

Regarding the errors in Ms. Cook's work, several factors make determining the true extent of her problems difficult to ascertain. For instance, the testimony in this case establishes that constructing geocells such as these is not

work that anyone does "error free". The question then becomes: "How many errors are too many errors?" Plus, while there are clear cut, objective type errors that can be made in this kind of work (i.e. when a road is abruptly and inexplicably discontinued), there are also errors of a subjective nature, such as determining whether there has been too much detail or not enough detail included in a particular geocell (Volume I, pages 211212; 290).

Finally, and perhaps more critically, it is unclear exactly how and when Ms. Cook's work was reviewed and evaluated by her supervisors. Some testimony indicated that it was several months after the fact before Mr. Braudaway learned of some of Ms. Cook's performance problems (on the Finland and Swiss projects), although other testimony suggested more immediate reviews of Ms. Cook's work may have been done by the project leads (other than Mr. Braudaway) overseeing these two prior projects (volume 1, pages 38-42, 57-62). In one place, Mr. Braudaway testifies that it was late March before he became aware of Ms. Cook's difficulties performing her job (volume 1, page 63). In any event, Ms. Cook's testimony is that she had little to no forewarning that her job was in jeopardy (volume 1, pages 234-235; 250-251, 288-290), and we know that prior to the memo of May 8, 1996, she had no formal written notification (volume 1, pages 287-288). Apparently, her first formal counseling came in a meeting between Ms. Cook, Mr. Braudaway, Ms. Bernal and Mr. Larue, on May 2, 1996, which Mr. Braudaway said he called because beginning in late April, the leads on the Malaysia project were complaining that they were having problems interacting with Ms. Cook [volume 1, page 75t]. The first written documentation regarding Mr. Braudaway's concern about Ms. Cook's performance was apparently done in response to a conversation between himself and his boss, Mr. Resendes, resulting ii) a memo dated April 23, 1996 (volume 1, page 79; Exhibit 12).

Of some significance, in the meeting of May 2, 1996 Gracie Cook told Mike Braudaway that she felt lie was discriminating against her, and although Mr. Braudaway said her allegation "offended" him, he testified that he realized Ms. Cook was upset and frustrated, and that he dismissed her

comment as coming from her own frustration (volume 1, page 87). He did not report the allegation to HR or further investigate it volume 1, page 99). Although Mr. Braudaway's testimony is not altogether clear, in at least one place, lie testified that prior to his meeting of May 2, 1996 (and prior to her allegation of discrimination) he had decided that Ms. Cook would need to be terminated (volume 1, page 90).

After the initial meeting of May 2, 1996, Mr. Braudaway delivered to Ms. Cook Exhibit 12 (specifically, those pages that are bate-stamped 000085 and 000086). This was her first and only written warning. At some point around this same time, Mr. Braudaway decided to construct a test bed, testifying lie designed this test to give Ms. Cook the opportunity to show that she could do the work. The test was constructed with specific time deadlines (i.e. she was given a specific number of days to complete the task), and Ms. Cook's cubicle mate was instructed to not assist Ms. Cook in any way in completing the job (volume I, page 323).

After receiving the May 8, 1996 written warning and beginning her work on completing the test bed, Ms. Cook requested a meeting between herself, Mr. Braudaway and HR. This meeting was held May 14, 1996. During this meeting, Ms. Cook showed signs that she was experiencing stroke-like symptoms. Mr. Braudaway testified that during this meeting she was crying and stuttering, that she was rubbing her left arm as though she was in pain and that he himself was concerned about her ability to drive herself to her doctor's office (volume I, 114-115; 204-205). Ms. Dively's notes coincide with Mr. Braudaway's testimony (Exhibit 1 l) and in fact, Mr. Resendes testified that Ms. Dively told him that Ms. Cook had had a stroke and that that was the reason she was out on medical leave (volume II, page 87).

In fact, it was after this meeting that Ms. Cook left Hughes on a medical leave, not to return to work until early August 1996.

ALLEGATIONS:

Ms. Cook's complaint invokes in essence the following two causes of action:

1. Retaliation
2. Intentional infliction of mental anguish/emotional distress

Also, Littleton Cook, as Gracie's husband and co-plaintiff, has filed a loss of consortium claim that the parties agreed would be heard as a part of this proceeding.

DISCUSSION AND FINDINGS:

With regard to Ms. Cook's claim of retaliation, the evidence is insufficient to establish that a negative employee action was taken against her because of the complaints she made that she had been discriminated against. While clearly Ms. Cook did engage in protected activity when making her complaints, the evidence is insufficient to establish that Ms. Cook's complaints were what brought about the Defendant's negative employment action against her. Instead, the greater weight of the overall evidence as presented on this count suggests that Ms. Cook was an employee who in fact had performance problems, and that her employer was within its rights in pursuing corrective action against her.

With regard to Plaintiff's assertion that Defendant was responsible for intentionally inflicting mental anguish, there are four questions that must be answered affirmatively to establish a finding in the Plaintiff's favor:

1. Did the Defendant act intentionally?
2. Did Defendant's conduct cause the Plaintiff emotional distress?
3. Was the Plaintiff's distress severe?
4. Was the Defendant's conduct extreme and outrageous?

In this respect, there have been allegations made by the Plaintiff that Mr. Bruadaway yelled at Ms. Cook after Carmen Bernal, her cubicle mate, had left for the day. There have also been allegations that Mr. Braudaway treated Ms. Cook with disdain, and attempted to berate her in front of her

co-workers (volume I, page 244, 312-318). The evidence regarding these matters is conflicting, and frankly, does not by a preponderance of the evidence meet the above four criteria. Assuming these allegations were established by a preponderance of the evidence as having happened, under the existing case law as has been exhaustively and

impressively set forth by counsel for the defendant, standing by themselves, these actions do not in and of themselves pass as examples of extreme and outrageous conduct in the workplace.

However, the testimony that clearly stands out as most damning to Defendant is not what happened between Ms. Cook and her employer or managers in March, April or May of 1996 (or for that matter, anytime before) but what happened when Ms. Cook attempted to return to work in August of 1996, following her medical leave of absence (and presumed stroke) in May of 1996.

In this regard, we have Mike Braudaway testifying repetitively that he was only "acting under orders from HR" regarding how to proceed with Ms. Cook when he ordered that she pick up where she left off on the test bed he had constructed for her. Volume 1, page 119: "The gist of what I told her was what the plan was, and I gave her the option of telling her that if she didn't agree with it, that she needed to go pursue this with HR and her doctor. I was following orders." (Please note, however, that in conflict with Mr. Braudaway's clear and consistent testimony in this regard is the testimony of Melanie Dively, the head Human Resources person at the Arlington location, who said that Mr. Braudaway never asked for her advice regarding how to treat Ms. Cook's "days remaining" on the test bed he had constructed for her prior to her earlier medical leave of absence [volume II, page 240].) In any event, the evidence shows that when Ms. Cook attempted to return to work in

August of 1996, Hughes' management was clearly aware of the following:

1. Gracie Cook was an employee who, when told three months earlier that her job was on the line and given a test project designed to determine her suitability for the job, had exhibited physical signs and symptoms of a person having a stroke (volume I, pages 1141 l 5; 171-175; 204-20_5). By all testimony, since leaving work in May of 1996, Ms. Cookhad been under a physician's care and treatment, and had been through rehabilitation. (Exhibits 13, 14, 15). There was no evidence and no suggestion by defense counsel that Ms. Cook was in fact "faking it" or in any way had contrived her physical problems as away around the challenges facing her at work.

2. When Ms. Cook was told in August that "we will be picking up where we left off', MsCook attempted to explain to Mr. Braudaway that what her physician had in fact said in releasing her back to work was that "there is no way of knowing what she is capable of doing until she goes back and tries" (volume 1, pages 121; Exhibit 11). In response, it appears Ms. Cook(as paraphrased here): "Sorry, but that's not what this piece ofpaper [the doctor's release] says. Clear it up with your doctor or with HR. Otherwise, I'vebeen instructed to put you back to work on your test bed, on which you have eight days tosatisfactorily complete or be terminated." (Volume I, page 115, Page 119 lines 22-25).

Regarding the whole idea behind the test bed, it is clear that in Ms. Cook's case, Hughes was not dealing with an employee who had a motivation problem or was lazy. If that were the case, the test cell would perhaps have been a reasonable avenue to ascertain-and to bring home to the

employee-the severity of her prior failure to perform. However, as the facts establish in this case, Ms. Cook worked very hard. Motivation was not her problem. In this regard, the uncontroverted testimony is that Ms. Cook came to work early (sometimes as early as 4:30 to 5:00 a.m.), frequently worked through her lunch hour and breaks, and stayed later into the afternoon and evening hours in an attempt to get the job done satisfactorily. Volume 1, pages 229, 242). In two days of testimony, no evidence was introduced suggesting Ms. Cook wasted time on the job by excessive visiting with co-workers, playing cards, taking care of personal business, talking on the phone, or otherwise engaging in non-work related activity. It was uncontroverted that Ms. Cook was indeed trying very hard to do the work her employer expected of her. (In fact, in Mr. Braudaway's

warning letter to her of May 8, 1996, he writes "You have tried very hard ...."; Exhibit 12, bate stamped 000086.) It appears that for whatever reason, despite her apparent best efforts, Ms. Cook encountered difficulties with both her speed in accomplishing the job as well as with the overall quality of her work.

It is uncontroverted that in May of 1996, while under the pressure of completing the test bed in an effort to save her job, Ms. Cook had (in front of Mike Braudaway and Melanie Dively) suffered stroke like symptoms. As discussed earlier, her speech became stammering, she complained of pain in her left arm, and became disoriented to the point where Mr. Braudaway walked her to her car, offering to drive her to her doctor's office.

It would seem that watching another human being go through such obvious and severe physical problems would make an impression which would result in increasing one's sensitivity to the involved individual's fragile physical/neurological condition. But apparently, it did not. This is where Hughes runs into trouble.

Despite the fact that Hughes' management knew of Ms. Cook's stroke in 1988 and had observed her in apparent physical distress and exhibiting stroke like symptoms, precipitating her going out on medical leave for close to three months, on Ms. Cook's first day back at work, a decision was made (after several meetings and telephone conferences apparently, Exhibit 11) to order that she "pick back up" with eight days remaining to complete the test bed designed to establish her competency or incompetency for her work as a database engineer. While witnesses testifying for the defense indicated that this test was designed to establish whether Ms. Cook could in fact do the work of a database engineer, having heard all of the testimony, arguing that there was any doubt in anyone's mind as to what the outcome of this test would be simply lacks credibility. If one assumes that Ms. Cook's prior work performance was as severely lacking as defense witnesses said it was, everyone involved knew-or should have known-that they were putting Ms. Cook in a particularly stressful situation in which she was doomed to fail.

Answering then, the four criteria required to show intentional infliction of mental anguish:.

1. Were the Defendant's actions intentional? Yes, when the Defendant instructed the Plaintiff she had eight days remaining to prove her ability to do the work, they were clearly acting intentionally. Numerous conversations took place between various Hughes employees prior to making this determination and so instructing Plaintiff.
2. Did the Defendant's action cause the Plaintiff stress? Clearly.
3. Was the Plaintiff's stress extreme? Yes.
4. Was the Defendant's conduct extreme or outrageous? Under these unique circumstances

> in which her employer knew (and had observed) Ms. Cook's prior response to this added stress a few months earlier and the stroke-like physical symptoms that had resulted, putting Ms. Cook right back into that same stress-inducing situation was extreme and outrageous. By doing so, Raytheon knowingly placed Ms. Cook's physical and mental health in jeopardy.

In this last regard, there are numerous notes in the Human Resources file (Exhibit 11) that cause considerable concern. In more than one place, HR apparently questioned whether they should receive another assessment (the Liberty Mutual doctor's opinion) regarding whether Gracie Cook was truly in a position to come back to work. When asked, Ms. Dively responded that it was "not her job" to consult the other doctor mentioned in her written notes; that would be another employee's responsibility. (Mr. Braudaway likewise felt that further inquiry into Ms. Cook's physical status did not fall into his job description, in that it was "an HR function", volume I, page 196-197.)

Without regard to whose official job it was, it would appear that once HR was aware that there was a very real and potential concern regarding Ms. Cook's physical state and notes were recorded suggesting that further inquiry be made, it would certainly seem that it became someone's responsibility to follow up. Ms. Dively was the top person at the Arlington office in HR, so if it was not in fact Ms. Dively's responsibility, it would have been one of her direct report's responsibilities.

On the page located in Exhibit 11 bate stamped 000123B, there are three points listed under "Action". The first one references getting clarification regarding what accommodations might be necessary, as discussed above. The second note here read:"If provided a full release-we don't have a position in which she can work. We need to call Lidia

Cossi (testimony indicated she was in the legal department) about what we do with Gracie." In this regard, Ms. Dively testified that in retrospect, her note doesn't make sense. However, one must wonder if the note did in fact make sense when it was written, and that Hughes was not wanting Ms. Cook back in the database department, with or without a medical release.

With regard to the second note (i.e. " If she is returning for `rehabilitation', then we can deny this"), Ms. Dively's testimony is confusing. At one point, she testified that it meant "if she's just returning to see if she can do the job, then we would deny that she comes back. She needs to be full release, truly able to work." (Volume 11, page 226.) Later, she testifies that under certain circumstances, they would have worked with Ms. Cook, but at this point, who really knows. These notes, even when read in their most positive light, reflect poorly on Hughes' response in this situation.

One final note: It appears Defendant was indeed aware that taking action to terminate Ms. Cook may bring legal action and they were wanting to protect themselves accordingly. After all, Defendant knew that Ms. Cook was African American, they knew she was older, and they knew she was female. There is nothing inherently wrong and certainly nothing illegal about wanting to protect oneself from future litigation. . However, could it be that their concern over future litigation overshadowed the far more important factor that this older, female, African American employee was also a person with a serious medical condition? Could it be that the test bed was designed to serve as future evidence to prove that they did not fire her on account of her color, sex or age? Could it be that in their zeal to disprove all the reasons they were NOT firing GracieCook, they lost sight of the person with whom they were dealing?

DAMAGES:

Ms. Cook's claim for back pay, front pay and attorney's fees under her cause of action for retaliation are, for those reasons aforementioned, in all ways denied.

Ms. Cook's claim based on intentional infliction of mental anguish is found to be meritorious, and it is ordered that Defendant Raytheon pay Gracie Cook $200,000.00 in damages, with pre-judgement interest as allowable under law beginning as of the date that Plaintiff first initiated legal action against Defendant by filing her complaint with the EEOC.

With regard to Mr. Cook's claim, the testimony shows that his life was affected by the acts taken by Defendant involving his wife, Gracie Cook, and accordingly, his claim for loss of consortium is found to be meritorious. While putting an exact dollar figure on Mr. Cook's loss is troublesome, it does appear as though the Cooks' lives as a married couple have been regrettably and inalterably changed. Accordingly, Defendant Raytheon is ordered to pay Littleton Cook $25,000.00 in damages, with pre judgement interest as allowable under law beginning as of the date that Ms. Cook first initiated legal action against Defendant by filing her complaint with the EEOC.

Punitive damages, having been considered, are hereby denied.

Further, in the event of an appeal by Defendant, and in the event that following appeal, this award stands undisturbed, Defendant is ordered to pay an additional

$25,000.00, or whatever amount the reviewing tribunal determines to be fair and equitable, to Plaintiff as attorney's fees.

Finally, pursuant to the Court's prior ruling in this case, Defendant is directed to pay all costs associated with

this arbitration, the same of which is here attached on the Exhibit A.

STATUTE OF LIMITATIONS:

Defendant's argument that the statute of limitations should bar this action fail in that Ms. Cook's EEOC related claims for retaliation have been in all ways denied.

The intentional infliction of emotional distress cause of action has a two year statute of limitation, under which Ms. Cook has established her right to recover. Further, the uncontroverted testimony is that when Gracie Cook was last seen at Hughes, she was not only distraught but disoriented and confused. Subsequent to going on her second medical leave, Ms. Cook continued under the care and treatment of both medical doctors as well as psychologists. In this regard, at the hearing she testified to her struggle with depression after this last series of strokes: "When I'm depressed, it's a feeling that I don't want anyone to have because it's that you have that feeling of hopelessness. It's hopelessness and that you really don't want to go on. You just would like to just kind of end it all . ...it's the bottomless feeling that you don't want to get out of bed, you don't want to shower, you don't want to eat. It saps all of your energy, leaves you without enough energy just barely to walk from the bed to the bathroom, and you want your gown on all day, you want the windows dark and it's-you don't want to clean and you don't want to see the sun shine."

(Volume I, page 267) In light of this testimony, it would appear that Ms. Cook was not intentionally or negligently dragging matters out to the unfair disadvantage of her former employer, but was genuinely indisposed.

FINAL COMMENT:

Having heard and considered all of the testimony in this matter, having reviewed the transcripts in their entirety

and having the benefit of counsel's well-written and exhaustive posthearing briefs, it is my opinion that there are two victims, if you will, in this case.

Besides the obvious (Gracie Cook) Mike Braudaway appears to have properly and timely sought the advice and counsel of the Human Resources Department (despite Melanie Dively's testimony to the contrary, it appears as though HR gave Mr. Braudaway the green light, if not direct instructions, to "pick up where they left off" with Gracie Cook). Simply put, Mr. Braudaway was given bad, bad advice by professionals who are charged with the responsibility of knowing how to properly respond to employee issues. By putting Ms. Cook back "in the hot seat" (the action the Human Resources Department either suggested or endorsed) Raytheon jeopardized not only the emotional well-being but the very life of one of its employees.

Hopefully, in the almost four years that have ensued since this situation first arose, Raytheon has improved the training it provides those individual employees such as Mike Braudaway to whom they look to carry out managerial responsibilities. More critically, it is hoped that Raytheon has reevaluated its Human Resource Department, and has given these employees the education and training they need to be able to do a better job responding to critical employee issues such as the one they failed to properly respond to concerning Gracie Cook.

SIGNED THIS, THE 3rd DAY OF APRIL, 2000

s/_____

M. BETH KRUGLER,

PRESIDING ARBITRATOR

No. 01-846

IN THE

Supreme Court of the United States

GRACIE COOK and LITTLETON COOK,

Petitioners,

v.

HUGHES TRAINING, INC., HUGHES ELECTRONICS CORPORATION, and RAYTHEON COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I. WHETHER AN ARBITRATION AGREEMENT THAT INCLUDES A STANDARD OF REVIEW FOR ARBITRATION AWARDS IS ENFORCEABLE ACCORDING TO ITS TERMS.

II. WHETHER, AS A MATTER OF CONTRACT CONSTRUCTION, AN ARBITRATION AGREEMENT THAT INCORPORATES BY REFERENCE ARBITRATION PROCEDURES SET FORTH IN A SEPARATE DOCUMENT IS UNAMBIGUOUS.

III. WHETHER, UNDER TEXAS LAW, AN ARBITRATION AGREEMENT CONTAINING A STANDARD OF REVIEW FOR ARBITRATION AWARDS IS NOT UNCONSCIONABLE WHERE THE APPELLATE STANDARD IS EQUALLY AVAILABLE TO BOTH THE EMPLOYEE AND THE EMPLOYER.

IV. WHETHER, ON THESE FACTS, THE DISTRICT COURT WAS CORRECT IN SETTING ASIDE THE ARBITRATOR'S AWARD BECAUSE THE EMPLOYER'S CONDUCT WAS NOT "EXTREME OR OUTRAGEOUS" AS A MATTER OF LAW.

STATEMENT PURSUANT TO RULE 29.6

Corporate Respondents

Hughes Training, Inc.
Hughes Electronics Corporation
Raytheon Company

In 1997, Hughes Electronics Corporation merged its defense business into Raytheon Company, and Hughes Training, Inc., merged into Raytheon in 1998. Accordingly, Raytheon Company is the successor-in-interest to both Hughes Training, Inc., and Hughes Electronics Corporation. Raytheon Company has no parent company holding more than 10% of its stock.

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Respondents respectfully request that the Court deny the petition for writ of certiorari. The lower court examined the parties' arbitration agreement and reviewed the arbitrator's findings of fact and conclusions of law in accordance with the standard of review contracted for by the parties in their arbitration agreement. In doing so, the lower court acted squarely in accord with precedent from this Court and other courts of appeal.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 254 F.3d 588 and is reprinted at page 1a of the Appendix to the Petition for Writ of Certiorari.

The decision of the United States District Court for the Northern District of Texas is reported at 148 F. Supp.2d 737 (Judge Eldon B. Mahon presiding) and is reprinted at page 13a of the Appendix.

The opinion of the arbitrator in the matter of Gracie Cook and *Littleton Cook v. Hughes Training, Inc., et al.*, which underlies Petitioners' appeal, is reprinted at page 26a of the Appendix.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to section 1254 of Title 28 of the United States Code which governs appeals of decisions of federal courts of appeal. *See* 28 U.S.C. § 1254 (West 1993).

The final judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 29, 2001. The jurisdiction of the Court of Appeals was premised upon section 1291 of Title 28 of the United States Code which concerns appeals from final decisions of district courts. *See* 28 U.S.C. § 1291 (West 1993).

The final decision from the United States District Court was entered on October 23, 2000. The district court had diversity jurisdiction pursuant to section 1332(a) of Title 28 of the United States Code. *See* 28 U.S.C. § 1332(a).

STATUTES INVOLVED

Section 2 of the Federal Arbitration Act (the "FAA"), codified at 9 U.S.C. § 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 10 of the FAA, codified at 9 U.S.C. § 10, provides:

> (a) In any of the following cases the United States court in and for the district wherein the award was

made may make an order vacating the award upon the application of any party to the arbitration –

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there is evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other behavior by which the rights of any party have been prejudiced.

(4) Where the arbitrator exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

COUNTERSTATEMENT OF THE CASE

Gracie Cook is a former employee of Hughes Training, Inc. (referred to as "Raytheon").[1] When Cook was first hired in 1993, she executed a contract entitled "Mutual Agreement to Arbitrate Claims" (referred to as the "Arbitration Agreement"). This Arbitration Agreement provided that all employment disputes would be submitted to final and binding arbitration. The Arbitration Agreement further stated that "Arbitration under [the] Agreement may be compelled and enforced according to the FAA (9 U.S.C. § 1 *et seq.*) and shall be conducted in accordance with the EPRP [the Employee Problem Resolution Procedure] Arbitration Procedure, which is incorporated herein by reference."

The Employee Problem Resolution Procedure (the "EPRP") contained the following provision relating to an appeal from an arbitration award:

> Either party may bring an action in any court of competent jurisdiction to compel arbitration under this Agreement, to enforce an arbitration award, and to vacate an arbitration award. However, in actions seeking to vacate an award, the standard of review to be applied to the arbitrator's findings of fact and conclusions of law will be the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury.

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1. Hughes Training, Inc. and Hughes Electronics Corporation are companies affiliated with Hughes Aircraft Company (the party to the Arbitration Agreement) and, by the terms of the agreement, both are bound thereunder.

By signing the document, Cook acknowledged that she had read both the Arbitration Agreement and the EPRP.

In 1995, Cook was transferred to the database engineering department at Raytheon under the supervision of Mike Braudaway. The database engineering department is responsible for creating geocells, using computer simulation, that reflect the topography of the various countries to whom Raytheon sold its simulators. The department worked under strict time and budgetary demands for which Braudaway was responsible.

Almost from the beginning, Cook struggled to comply with the budgetary and time constraints of the job. In an effort to improve Cook's performance, Braudaway provided additional training for Cook and paired her with Carmen Bernal (a stronger, more efficient employee) to assist Cook in her production and to increase her awareness of her performance problems. However, despite these efforts, Cook's performance improved only marginally in that her work was inconsistent and her error rates remained high.

Following a meeting on May 6, 1996, Braudaway informed Cook in writing that she would have until May 31, 1996 to improve her database development skills. On that date, Raytheon would evaluate her work, and, if her skills did not improve, Raytheon would take further action which could include termination. In response, Ms. Cook accused Braudaway of discrimination.[2]

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2. In their Statement of the Case, Petitioners spend several pages detailing facts and opinions concerning allegations of discrimination and retaliation which are not part of this case. (*Petition* at 6-8). At the arbitration hearing, Cook abandoned her race discrimination

(Cont'd)

About this same time, Mr. Braudaway constructed a "test bed" evaluation for Cook to complete within a specified period of time without the help of her coworkers. Within a few days of the test bed assignment, Cook met with Braudaway and Melanie Dively, the Human Resources Manager. Cook became upset at the meeting. She began to cry, stutter, and rub her arm. Braudaway offered to call Cook's doctor, but she refused. Cook left the meeting and went to her doctor.

Following the doctor's visit, Cook reported to Raytheon she had suffered from a series of "mini-strokes." She briefly returned to work on May 17, 1996, but soon after took a three month medical leave of absence. She did not return to Raytheon until early August 1996.

At Cook's insistence, her doctor permitted her to return to work on August 5, 1996 – ten days before his initial authorization date. The doctor's written note indicated that Cook could return to work with no restrictions. Consequently, when Cook reported back to work on August 5, Braudaway returned her to her normal work routine, which included the test bed evaluation. When Ms. Cook learned that she would be required to resume the test bed evaluation, she told Braudaway that, despite her doctor's full release, she could

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(Cont'd)
claims, leaving only her claims for retaliation and intentional infliction of emotional distress and Mr. Cook's claim for loss of consortium. In her award, the arbitrator found Cook's retaliation claim was meritless. Respondents therefore take exception to the inclusion of each and every reference to perceived discrimination and retaliation, including all references to a "good old boy" environment or the inference that Braudaway created the test cell evaluation in retaliation for Cook's protests of discrimination.

not perform at the same level. She began to cry and later alleged to have had a "seizure" during her meeting with Braudaway. After Ms. Cook calmed down and regained her composure, Braudaway suggested that, if she felt that she could not do the work, she should either contact the human resources department about transferring into another position or consult with her physician about modifying her restrictions. Later that week, Cook voluntarily left work at Raytheon.

In April 1998, Cook filed suit alleging intentional infliction of emotional distress in connection with the end of her employment at Raytheon. In 1999, Cook added both state and federal claims for race discrimination and retaliation. Her husband, Littleton Cook, filed a claim for loss of consortium. Raytheon compelled arbitration, and the parties submitted all claims to the arbitrator for resolution.

The arbitrator issued an opinion (the "Arbitration Award") finding in favor of Raytheon on the retaliation claim (Cook had dropped her claim for discrimination), but awarding $200,000 to Gracie Cook on the intentional infliction of emotional distress claim and $25,000 to Littleton Cook on the loss of consortium claim. Raytheon filed a motion to vacate the arbitrator's decision in federal district court. Raytheon argued that, under the judicial standard of review agreed upon by the parties, the evidence did not support a finding that Raytheon intentionally inflicted emotional distress. The Cooks argued, as they do here, that the standard of review incorporated in the Arbitration Agreement was inconsistent with the agreement itself and unconscionable in light of the parties' respective bargaining positions. Alternatively, they argued that the evidence supported the claim for intentional infliction of emotional

distress. The district court issued an order vacating the arbitrator's award. The court concluded that the parties lawfully contracted for a more expansive standard of review, and that the decision to return Ms. Cook to the test bed evaluation was not extreme or outrageous conduct. The court further concluded that Cook failed to establish her claim for intentional infliction of emotional distress and that Littleton Cook's derivative claim for loss of consortium must likewise fail. The Cooks appealed to the Fifth Circuit, which affirmed the district court's opinion.

REASONS FOR DENYING THE WRIT

The issues presented by this case boil down to basic contract interpretation. Under the FAA and the directives of this Court, arbitration agreements must be interpreted in accordance with the agreement's terms and the parties' intentions. Here, Petitioners seek to avoid an unambiguous term of their contract which modifies the FAA's default standard of review for arbitration awards. Because this Court has repeatedly emphasized that that parties are free to structure their arbitration agreements as they see fit, the district court and the Fifth Circuit correctly construed the contract to enforce the standard of review bargained-for by the parties.

In a transparent attempt to grab this Court's attention, Petitioners state that the Fifth Circuit's opinion in this case is "in conflict with the United States Courts of Appeal for the Seventh Circuit and Tenth Circuit" regarding whether parties to an arbitration agreement may contractually modify the standard of review of an award. *Petition* at 11. However, Petitioners have overstated their position. What Petitioners fail to state is that the Seventh Circuit has yet to address the

very issue they present to this Court for consideration and that the Tenth Circuit opinion is a recent anomaly that has yet to be interpreted by other circuits. Moreover, as demonstrated below, the lower court and appellate decisions rest squarely upon Supreme Court precedent and earlier case law from the Fifth Circuit. Even if the Court were to disagree and be inclined to weigh in on the purported "conflict," the district court's decision vacating the arbitration award must still stand because the arbitrator's ruling was in "manifest disregard of the law."

I. The Fifth Circuit's ruling squarely rests on Supreme Court precedent and is in line with the majority of other circuits that have addressed this issue.

Decisions from this Court make it clear that the primary purpose of the FAA is to ensure enforcement of private agreements to arbitrate in accordance with the agreement's terms. *See, e.g., Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478-79 (1989); *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (noting that "the FAA compels judicial enforcement of a wide range of arbitration agreements."). Because arbitration is simply a matter of contract, "parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479; *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). Indeed, the FAA "does not operate without regard to the wishes of the contracting parties." *Mastrobuono*, 514 U.S. at 57. Thus, if parties contract to arbitrate pursuant to rules or procedures different than those provided for in the FAA, Congressional intent underlying the FAA is nonetheless satisfied so long as the parties' agreement is enforced.

See Volt, 489 U.S. at 478 (holding that the FAA permits parties to "specify by contract the rules under which . . . arbitration will be conducted.").

The Fifth Circuit first held that parties may contractually fashion their own standards of review of an arbitration decision in *Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 996-97 (5th Cir. 1995). Since that time, very few courts have had to weigh in on the issue. However, of those few that have, virtually all hold that parties may contractually modify the FAA's standard of review. *See, e.g.*, *Roadway Package System, Inc. v. Kayser*, 257 F.3d 287, 292-93 (3d Cir. 2001) *cert. denied*, 122 S. Ct. 545 (Nov. 13, 2001); *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 888 (9th Cir. 1997); *Syncor Int'l Corp. v. McLeland*, No. 96-2261, 1997 WL 452245 at *6-7 (4th Cir., Aug. 11, 1997); *M & L PowerServs., Inc. v. American Networks Int'l*, 44 F. Supp.2d 134, 151 (D.R.I. 1999); *New England Util. v. Hydro-Quebec*, 10 F. Supp.2d 53, 63 (D. Mass 1998); *Flexible Mfg. Sys. v. Super Prods. Corp.*, 874 F. Supp. 247, 248-49 (E.D. Wis. 1994); *Flight Sys. v. Paul A. Laurence Co.*, 715 F. Supp. 1125, 1127-28 (D.D.C. 1989). Accordingly, the Fifth Circuit's ruling in the instant case is not only in line with the directives from this Court, but also consistent with its earlier *Gateway* decision and with the greater weight of authority on this issue.[3]

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3. This Court recently denied certiorari in a case involving this same issue. *See Kayser v. Roadway Package System, Inc.*, 122 S. Ct. 545 (Nov. 13, 2001). In *Kayser*, the parties' arbitration agreement contained a generic choice-of-law clause stating that any judicial review of the arbitrator's award would be conducted pursuant to Pennsylvania law. The parties disputed whether the clause contractually modified the FAA's standard of review. The Third (Cont'd)

As the primary basis for their petition for writ of certiorari, Petitioners cite to two other circuits which they claim disagree with the Fifth Circuit on the issue of whether, as part of the arbitration agreement, parties may contractually expand judicial review of an arbitrator's award. (*Petition* at 12). However, Petitioners overstate their case.

A. There is no "conflict" between the Fifth and Seventh Circuits because the Seventh Circuit has yet to address the merits of the issue.

The first opinion Petitioners point to as evidence of a conflict in the circuit courts is *Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991). (*Petition* at 12). In *Chicago Typographical Union*, a panel of the Seventh Circuit considered an arbitration agreement which did not contain a provision for expanding judicial review of the award. In fact, the dispute in *Chicago Typographical Union* centered upon alleged violations of an agreement to arbitrate a labor dispute by one of the parties. *See id.* at 1503-05. The level of judicial scrutiny of the arbitration award was never at issue. Indeed, the court evaluated the arbitrator's decision without reference to any

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(Cont'd)
Circuit held that, although the FAA permits parties to contract for vacatur standards other than those provided by the FAA, a generic choice-of-law clause did not manifest a clear intent by the parties to abandon the FAA standards. *See Roadway Package System, Inc. v. Kayser*, 257 F.3d 287, 297 (3d Cir. 2001). Although Kayser's appeal to this Court concerned only whether a generic choice-of-law provision incorporating state law is sufficient to opt out of the FAA's standard of review, this issue was intertwined with the permissibility of the parties to contractually modify the judicial review of an award as a threshold inquiry.

contractually conferred standard of review. Consequently, Petitioners' reliance upon any language from the Seventh Circuit's opinion in *Chicago Typographical Union* as evidence of a "conflict" with the Fifth Circuit's ruling (*Petition* at 12) is clearly misguided. Any passing advisory reference from the opinion as to the parties' rights to expand the judicial review of an arbitration award is in a completely different context. Even a cursory review of the Seventh Circuit's opinion reveals that it does not contain any probing on-point analysis of the FAA. Simply stated, Petitioners have put words in the mouth of the Seventh Circuit in an effort to create a basis for this Court's jurisdiction.

B. The Tenth Circuit's opinion in *Bowen v. Amoco Pipeline Co.* is a recent anomaly.

The second opinion Petitioners cite as the basis of their conflict in the circuits argument is *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001). In *Bowen*, the Tenth Circuit concluded that parties may not contract for a standard of review different than the standard provided by the FAA. *See id.* at 936. In so doing, a single panel of the Tenth Circuit was the first to hold that parties may not contractually modify the standard of review of an arbitration award.[4] While it

4. The *Bowen* opinion was handed down by a single panel of the Tenth Circuit, which included one visiting judge sitting by assignment. Indeed, additional study and review by the entire Tenth Circuit may have yielded a different outcome or, at a minimum, provided a concurrence or dissent for this Court's benefit. On the other hand, the Fifth Circuit's ruling in the instant case, while not en banc, does follow earlier precedent from a different Fifth Circuit panel. *Compare Gateway Tech., Inc.*, 64 F.3d at 997 *with Hughes Training Inc.*, 254 F.3d at 593. The fact that the issue Petitioners present was subjected to only a single-panel review highlights the need for further study and resolution within the circuit courts, as addressed later in this section.

seemingly appears that the Fifth and Tenth Circuit rulings are incompatible, the Court should nonetheless decline to exercise its jurisdiction. The issue presented, although important, is not yet suitable for resolution by this Court.

First, the *Bowen* decision cited by Petitioners does not comport with the underlying purposes of the FAA and is contrary to precedent from this Court. Nothing in the FAA prohibits parties who voluntarily agree to arbitration from providing contractually for more expansive judicial review of the award. Moreover, as stated above, earlier decisions from this Court make it clear that the primary purpose of the FAA is to ensure enforcement of private agreements to arbitrate in accordance with the agreement's terms. *See Volt Information Sciences, Inc.*, 489 U.S. at 478-79; *Mastrobuono*, 514 U.S. at 57; *First Options of Chicago, Inc.*, 514 U.S. at 943. By refusing to honor the standard of review bargained for by the parties in *Bowen*, the Tenth Circuit deviated from the directives of this Court concerning deference to the parties' intentions, and its ruling frustrates the purpose of the FAA. In short, *Bowen* was wrongly decided.

Second, the *Bowen* decision is so recent that there has not been time for other courts to further address the Tenth Circuit's error and provide thoughtful and constructive study for this Court's illumination. Indeed, the Tenth Circuit handed down its decision just a few days before the Fifth Circuit issued its ruling in the instant case. Importantly, neither the Fifth Circuit nor any other court has considered or addressed the reasoning relied upon by the Tenth Circuit in support of its ruling. Similarly, the Tenth Circuit has yet to consider the Fifth Circuit's ruling in this case or conduct an en banc review of the issue. At the present time, the Tenth Circuit's *Bowen* opinion stands alone as an aberration.

II. There is no error below warranting review.

The balance of the issues presented by Petitioners in an attempt to persuade the Court to exercise jurisdiction involve correcting what they perceive to be errors of law. The Court should disregard these grounds for two reasons. First, the district court correctly decided the substantive issues. Second, the questions presented do not have far-reaching implications to warrant the exercise of this Court's judicial resources.

A. The district court correctly construed the parties' unambiguous Arbitration Agreement.

Petitioners' ambiguity argument is premised upon a constrained construction of the Arbitration Agreement. First they contend that, because the Arbitration Agreement states that awards will be "final" and "binding," any provision in the Arbitration Agreement indicating that the award may be appealed gives rise to an ambiguity. (*Petition* at 14-15). Second, Petitioners contend that the Arbitration Agreement is fatally ambiguous because the Arbitration Agreement states that it will be enforced pursuant to the FAA; however, the standard of review set forth in the EPRP differs from the FAA's standard. (*Petition* at 14-15). However, based on the totality of the provisions in the Arbitration Agreement, Petitioners' contention that the agreement is ambiguous or inconsistent is simply untenable.

A contract provision is ambiguous only where the terms are susceptible to differing reasonable interpretations. *See Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 665 (Tex. 1987). That is not the case here. As set forth above, the Arbitration Agreement expressly incorporated the EPRP by reference. The EPRP clearly provided the standard of review

for an appeal from an arbitration award. Thus, the only reasonable interpretation of the parties' agreement is that the standard of review set out in the EPRP supplemented the provisions of the FAA. Because there is only one reasonable interpretation, there is no ambiguity in the Arbitration Agreement, and the district court did not err in construing the parties' contract according to its terms.

B. The Arbitration Agreement is not unconscionable.

One of the questions Petitioners presented for consideration concerns whether it is unconscionable for an employer and employee to execute an arbitration agreement that contains a provision modifying a standard of review of the arbitration award. Although Petitioners fail to provide any briefing in support of this issue, they have framed their issues to characterize the Arbitration Agreement as an "adhesion contract." (*Petition* at i and 14). This issue does not call for a review by this Court.

Contracts of adhesions, wherein one party has minimal bargaining power, are not automatically void. *See Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1154 (5th Cir. 1992) *cert. denied*, 506 U.S. 1079 (1993). To be voided, the contract must show that it is unconscionable. *See Pony Express Courier Corp. v. Morris*, 921 S.W.2d 817, 821 (Tex. App.—San Antonio 1996, no writ) (holding that substantive aspect of unconscionability is the fairness of the agreement). In this case, there was nothing fundamentally unfair about the Arbitration Agreement that could benefit either party that chose to appeal an award. Even though the EPRP's supplemental standard of review benefited Raytheon in this instance, the standard was equally

available to the Petitioners. Thus, as the Fifth Circuit noted in its opinion, it was not unfair for the Arbitration Agreement to contain a standard of review that allowed the district court to assess the arbitrator's legal and factual conclusions. Because there is no unconscionability, the district court did not err in construing the parties' contract.

III. Petitioners are entitled to no remedy because the result would be the same without the contractually modified standard of review.

The Court should decline Petitioners' invitation to exercise its jurisdiction because, even if the district court had not reviewed the arbitrator's decision under the standard of review fashioned by the parties, the outcome would nonetheless be the same. In addition to the FAA's statutory grounds for vacating an award, a district court may set aside the decision of an arbitrator when the award reflects an arbitrator's "manifest disregard of the law." *Williams v. Cigna Financial Advisors, Inc.*, 197 F.3d 752, 761 (5th Cir. 1999). Although the district court did not conduct a "manifest disregard of the law" review, it had the discretion to do so and could have set aside the arbitrator's award based thereon.

As the Fifth Circuit noted in *Williams*, in addition to the statutory grounds for vacating an arbitration award, the FAA implicitly allows a district court to set aside an arbitrator's decision that is in "manifest disregard of the law." 197 F.3d at 762. If it is manifest to the district court that the arbitrator acted contrary to the applicable law, the award must be set aside if it results in significant injustice. *Id.* That is precisely the circumstance here.

To recover damages for intentional infliction of emotional distress, a plaintiff must prove that: (1) the defendant acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the actions of the defendant caused the plaintiff emotional distress; and (4) the resulting emotional distress was severe. *See, e.g., Burden v. General Dynamics Corp.*, 60 F.3d 213, 218 (5th Cir. 1995). Texas law clearly takes a "strict approach to intentional infliction of emotional distress claims in the workplace." *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 612 (Tex. 1999). In order to properly manage its business affairs, employers must be able "to supervise, review, criticize, demote, transfer, and discipline employees." *Bruce*, 998 S.W.2d at 612 (citing *Johnson v. Merrell Dow Pharmaceuticals, Inc.*, 965 F.3d 31, 34 (5th Cir. 1992)). Courts have recognized that these events are unpleasant for employees and that emotional distress often results; however, "an employer must have latitude to exercise these rights in a permissible way. . . ." *Bruce*, 998 S.W.2d at 612. "Only in the most unusual of employment cases does the conduct move out of the realm of an ordinary employment dispute and into the classification of extreme and outrageous conduct." *Porterfield v. Galen Hospital Corp.*, 948 S.W. 2d 916, 920 (Tex. App.—San Antonio 1997, writ denied).

It is clear that state law does not provide for an award for intentional infliction of emotional distress based on facts such as these. All of the actions attributed to Raytheon were within the scope of supervising, reviewing, criticizing, and disciplining Cook. Both the district court and the Fifth Circuit recognized that Raytheon's returning Cook to her normal duties after her absence from work, when she was not restricted by her doctor, did not constitute "extreme or outrageous" conduct as a matter of law. *See Hughes Training,*

Inc., 254 F.3d at 594-95; *Hughes Training, Inc.*, 148 F. Supp.2d at 744-45. By holding contrary to established principles of law, the arbitrator's ruling was in manifest disregard of the law and resulted in a significant injustice to Raytheon. Accordingly, the district court was well within its authority to vacate the award.

CONCLUSION

As a matter of contract, Petitioners and Respondents were free to structure their arbitration agreement as they saw fit. The district court and the court of appeals correctly deferred to the parties' stated intentions and, as a result, their opinions were dictated by the FAA and precedent from this Court. Moreover, despite Petitioners' contention to the contrary, there simply is no conflict among the circuits ripe for review. For these reasons, Respondents respectfully request the Court deny the petition for writ of certiorari.

Respectfully submitted,

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